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1911

# REPORTS

OF

575

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF ALABAMA,

DURING THE

DECEMBER TERMS, 1883-84.

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BY

JNO. P. TILLMAN,

SPECIAL REPORTER.

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## OFFICERS OF THE COURT

DURING THE TIME OF THESE DECISIONS.

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### DECEMBER TERM, 1883.

ROBERT C. BRICKELL, <sup>1</sup> CHIEF JUSTICE, Huntsville.  
GEORGE W. STONE, <sup>2</sup> ASSOCIATE JUSTICE, Montgomery.  
H. M. SOMERVILLE, ASSOCIATE JUSTICE, Tuscaloosa.

### DECEMBER TERM, 1884.

GEORGE W. STONE, <sup>2</sup> CHIEF JUSTICE, Montgomery.  
H. M. SOMERVILLE, ASSOCIATE JUSTICE, Tuscaloosa.  
DAVID CLOPTON, <sup>3</sup> ASSOCIATE JUSTICE, Montgomery.  
  
H. C. TOMPKINS, <sup>4</sup> ATTORNEY-GENERAL, Montgomery.  
THOS. N. McCLELLAND, <sup>5</sup> ATTORNEY-GENERAL, Athens.  
  
JOHN W. A. SANFORD, CLERK, Montgomery.  
JUNIUS M. RIGGS, MARSHAL, Montgomery.  
FRANCIS L. PETTUS, <sup>6</sup> PRIVATE SECRETARY, Selma.  
STERLING A. WOOD, <sup>7</sup> PRIVATE SECRETARY, Tuscaloosa.

- 
1. Resigned 25th October, 1884.
  2. Appointed Chief Justice 25th October, 1884.
  3. Appointed 30th October, 1884.
  4. Term of office expired, November, 1884.
  5. Elected at General Election, August, 1884.
  6. Resigned prior to December Term, 1884.
  7. Appointed December 1st, 1884.



*Martin, Dume & Co. v. Brown, Shipley & Co.*, 442, and *Arrington v. Morgan*, 606, were reported by Jno. W. Shepherd, Esquire, the official reporter.



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# CASES

IN THE

## SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1883.

### Hobbs v. The State.

#### *Indictment for Forgery.*

1. *Proof of one offense when accused on trial for another; admissibility of.*—While, as a general rule, it is not permissible, on a trial for one offense, to prove that the accused has committed another and different offense, yet, if the two offenses form parts of the *res gestæ*, the latter is not excluded as extraneous.

2. *Forgery; when instrument will not support.*—A writing, void on its face because of the want of legal requisites to its validity, is not the subject of an indictment for forgery, in consequence of its incapacity to effect fraud; nor will a writing, so imperfect and obscure that it is unintelligible without reference to extrinsic facts, support an indictment for that offense, unless these facts are averred, and, by the averment, it is made apparent that it has the capacity of effecting fraud.

3. *Same; when instrument will support.*—An indictment charged the defendant with the forgery of an instrument which, omitting the date, address and signature, is in these words: "Please send me word how long you will give Stephen to pay for the bed, and if you will allow him time enough to pay for it let him have a cheap bureau as cheap as possible and I will see that you will get so and oblige, much a week. Just write it off the whole thing and send it to me." *Held*, that the instrument was of apparent legal efficacy, and not so imperfect and obscure that, without reference to extrinsic facts, it was unintelligible; that having these qualities, it had the capacity for the perpetration of fraud, and was the subject of forgery; and that it was not necessary to aver in the indictment that the fraud was consummated, the offense being complete by the false making of the writing, without the concurrence of damage or injury.

4. *Re-examination of witness discretionary with primary court.*—Recalling and re-examining a witness in the course of a trial at law, either in a civil or criminal case, is a matter resting in the sound discretion of the primary court, and is not revisable by this court on appeal.

5. *Forgery; presumption against one in possession of forged instrument.*—One found in the possession of a forged instrument, of which he purports to be the beneficiary, and applying it to his own use, must, in the absence of explanation, be presumed to have forged it, or to have been privy to its forgery.

[Hobbs v. The State.]

6. *Same; when sentence to hard labor proper.*—On a conviction for forgery in the second degree, a term of two years having been fixed upon as the punishment, the court can elect whether it shall be hard labor for the county, or imprisonment in the penitentiary; and if hard labor for the county is imposed, as in this case, it is proper for the court to impose “additional hard labor for the county for a term sufficient to cover all costs and officers’ fees,” etc.

APPEAL from Madison Circuit Court.

Tried before Hon. H. C. SPEAKE.

The indictment in this case charges Stephen Hobbs, defendant in the court below, appellant here, with the forgery of a written instrument, which, retaining the punctuation and style of copying found in the indictment, is as follows: “Huntsville—July. Mr E B Carter, Please send me word how long you will give Stephen to pay for the bed, and if you will allow him time enough to pay for it let him have a cheap bureau as cheap as possible and I will see that you get so and oblige, much a week J W Wall, Huntsville Just write it off the whole thing and send it to me.”

On the trial, as shown by the bill of exceptions, the State examined as a witness E. B. Carter, who testified that the defendant presented to him the instrument alleged to have been forged, when he let defendant “have a bedstead and a bureau.” The defendant objected to, and moved to exclude the witness’ statement, as to the bedstead, quoted above, because it was illegal and irrelevant, and because the paper alleged to have been forged did not name a bedstead, and did not appear to have been written to obtain a bedstead. The court overruled the objection and motion to exclude, and the defendant duly excepted. The witness further testified that the presentation of said paper to him, and the delivery of the bureau and bedstead to the defendant occurred in Madison county, in this State. The bill of exception then proceeds: “A witness was then sworn for the State, who examined the paper hereinafter set out, and alleged to have been forged, and testified that he did not write or sign said paper, and that he did not authorize any one to sign his name to it, and that it was not done with his knowledge or consent.” Then, after reciting that the solicitor read to the jury the paper alleged to have been forged, the bill of exceptions proceeds: “The plaintiff rested. The defendant also rested. The solicitor for the State argued the case. The defendant’s counsel argued the case, and made the point, that it had not been proved that John W. Wall, or J. W. Wall did not sign the paper alleged to have been forged. The court then, on motion of the solicitor, and against the defendant’s objection, allowed the State to recall E. B. Carter to the witness’ stand, and prove by



[Hobbs v. The State.]

him that he knew J. W. Wall, and that said J. W. Wall had just been examined in the case on trial. The defendant then duly excepted to the ruling of the court, in allowing said witness to be recalled, and examined. The defendant then proved by Lydia Brown facts tending to show that defendant could not write; and the State proved by William Cooper facts tending to show that defendant could write. This was all the evidence." The court charged the jury, *ex mero motu*, (1) "that the said paper offered in evidence was an obligation which, without the aid of extrinsic allegations or proof, would, if genuine, fix a liability on J. W. Wall"; and (2) "that if they found that Wall did not sign the order, or authorize it to be signed in his name, and if it were proved that the defendant had the writing offered in evidence, and handed the same to E. B. Carter, and obtained a bedstead and bureau from said Carter, and had failed to explain how he obtained said order or paper, the jury might infer that the defendant had written said paper, or procured it to be written." To each of these charges the defendant duly excepted.

After a verdict of guilty had been returned by the jury, but before sentence, the defendant moved the court "to arrest the judgment in the case, and to discharge" him, on the grounds that (1) the indictment did not charge him with any offense; (2) the paper alleged to have been forged, if genuine, is not a writing that created or imposed any liability; (3) "no fact *aliunde* the paper alleged to have been forged is alleged, which would cause said paper to impose any liability on any one;" and (4) "it is not alleged that defendant obtained any thing of value of any one by means of said paper alleged to be forged." The court overruled defendant's motion, and sentenced him to hard labor for Madison county for two years, "as a punishment for the offense committed," and for the additional term of one hundred and thirty-two days, for costs and officers' fees, they having been ascertained to be \$52.95, and the defendant having failed to pay or secure the same.

The rulings above noted are here assigned as error.

D. D. SHELBY, for appellant.—(1) An indictment charging the forging of an instrument creating no liability on its face, without averments *aliunde*, is demurrable.—*People v. Shall*, 9 Cowen, 778; *People v. Harrison*, 8 Barb. (N. Y.) 560; *Com. v. Ray*, 3 Gray 441; *Com. v. Lawless*, 101 Mass. 32; *Rembert v. State*, 53 Ala. 467; 2 Bish. on Cr. Law, 440-48. The order alleged to have been forged does not create, or purport to create any liability. Carter could not have recovered of Wall on the order, if it had been genuine, without proving that he did let Stephen have the bureau, and its value. These

[Hobbs v. The State.]

facts should have, therefore, been alleged. (2) The contract alleged to have been forged is one of guaranty. It purports to make Wall responsible for Hobbs' debt; and, if valid, is a guaranty.—Brandt on Suretyship, § 1. So Wall would have had the right to stand on the *exact* terms of the contract.—*Ib.* § 79. The contract, therefore, by its words not being enforceable, is void. Forgery can not be predicated upon a void writing.—2 Bish. on Cr. Law, 533; *John v. State*, 23 Wis. 504; *Abbott v. Rose*, 62 Me. 194; *Reed v. State*, 28 Ind. 396; *State v. Briggs*, 34 Vt. 503. (3) The order is void for uncertainty. It fixes no certain liability on Wall, even if it were proved, in a suit on the order, that Carter let Stephen have the bureau. If it binds Wall at all, it is to make weekly payments. Are the payments to be one cent a week, or one dollar a week? It is void for uncertainty.—Bish. on Con. §§ 22, 581; Pomeroy on Con. § 159 and note; 1 Chitty on Con. 93. (4) The order had no connection with the bedstead which Carter let defendant have. The court erred in not excluding Carter's testimony that he let defendant have a bedstead on the order. (5) The sentence in this case being for over two years, should the defendant not have been sentenced to the penitentiary, and not to hard labor for the county?—Code, 1876, § 4450.

H. C. TOMPKINS, Attorney-General, for the State. (1) The instrument alleged to have been forged purports to create a pecuniary demand or obligation, and comes within the statute. The meaning of the order, on its face, is plain, and is this: That if Carter would sell the bearer a cheap bureau, to be paid for in a reasonable time, to be agreed upon between them, the signer would see that it was paid for in that time by weekly installments, the amount of such installments to be determined by the time of payment agreed upon. (2) It is not necessary that a paper writing, to come within the statute, should be an instrument upon which an action may be maintained by simply setting it out in a complaint; for if such were the rule, no mere order would be within the statute. It is sufficient, if the instrument is one "which, if genuine, might apparently be of legal efficacy, or the *foundation* of a legal liability." Clearly the instrument set out in the indictment might be the "foundation of a legal liability."—*Rembert v. State*, 53 Ala. 467; 2 Bish. on Cr. Law, § 523; *Stearn's case*, 21 Wend. 413. (3) The evidence objected to was all part and parcel of the same transaction; and it was impossible to separate the part objected to, from the part conceded to be admissible. (4) The charge was in strict conformity to the rule laid down by this Court.—*Allen v. State*, in MSS.

[Hobbs v. The State.]

BRICKELL, C. J.—1. The writing, if genuine, was not an authority for the sale of a bedstead, or of any other article than a bureau; yet, the sale and delivery of the bedstead and the bureau, and the presentment of the writing were in point of time coincident, forming parts of the same transaction. It may be, the fact of the sale of the bedstead was unessential and unimportant; but it would have been difficult, in a narration of the fact of the presentment of the writing, and of the use to which it was applied by the defendant, to avoid reference to it. We can see no reason for separating the transaction into parts, admitting some in evidence, and excluding others. If, through the medium of the writing, the defendant obtained credit for the bedstead, the fact could properly be shown as indicative of the motives for its false making. As a general rule, it is not permissible, on a trial for one offense, to prove that the accused has committed another and different offense; but if the two form parts of the *res gestæ*, the one is not excluded as extraneous—it may be important as indicative of notice or of the *scienter*.—*Gassenheimer v. State*, 52 Ala. 313.

2. The motion in arrest of judgment, and the first instruction given the jury involve substantially the same and the main question in the case; which is, whether the writing is not void, without legal efficacy, and incapable of being the subject of forgery. The point of contention is, that it is fatally uncertain; that the price or cost of the bureau is not stated, nor is the time or manner of payment, and, of consequence, that it could not become the basis of a valid contract. A writing, void on its face because of the want of legal requisites to its validity, is not the subject of an indictment for forgery, in consequence of its incapacity to effect fraud. Illustrations are an unattested will of lands, and a conveyance of lands by a married woman, not purporting to be executed as the law may appoint. And a writing, so imperfect and obscure that it is unintelligible without reference to extrinsic facts, will not support an indictment for forgery, unless these facts are averred, and by the averment it is made apparent that it has the capacity of effecting fraud.—*Rembert v. State*, 53 Ala. 467. But it is quite an error to suppose that a writing like that set out in the indictment is invalid for the want of legal requisites, or that it is so imperfect and obscure, that, without reference to extrinsic facts, it is unintelligible. The law has not prescribed for it a particular mode of execution, nor declared its requisites. In form, substance, and legal effect, it is a proposition to pay the person to whom it is addressed, in weekly installments, the price or cost of a cheap bureau, which the person designated may purchase. It is an authority to that person to purchase, to agree upon the price, and to fix the installments in which it



[Hobbs v. The State.]

is payable. The limitation upon the authority is, that the bureau must be in price and value, *cheap*; that is, common as compared with others of greater value, and the price is not to be payable presently, or in a gross sum in the future, but in weekly installments, the sum of each installment having a reasonable correspondence to the price. When acted upon by the person to whom it was addressed; when the proposition was accepted, and there was a sale of a bureau, if there was not a plain departure from the limitations of the authority, the writer would become immediately liable—a debt would be created, his own debt, and not the debt of another. Similar writings are used daily in the transaction of business, have often been the subject of controversy, and their legal validity and operation, as creating direct engagements upon the part of the promisor, can not be doubted or questioned, though the sum payable, or the time of payment may not be expressed; these are determinable and rendered certain by the act of the person authorized to deal on the credit of the promisor.—*Bates v. Starr*, 6 Ala. 697; *Oliver v. Hire*, 14 Ala. 590; *Scott v. Myatt*, 24 Ala. 489; *Sanford v. Howard*, 29 Ala. 684. The writing is of apparent legal efficacy; if genuine, it would answer the purpose of its creation—enabling the person designated to buy a cheap bureau on the credit of the writer or person signing it, from the person to whom it is addressed. Having these qualities, it has the capacity for the perpetration of fraud, and is the subject of forgery. It was not necessary to aver in the indictment that the fraud was consummated. The offense was complete by the false making of the writing, without the concurrence of damage or injury.—*Jones v. State*, 50 Ala. 161.

3. Recalling and re-examining a witness in the course of a trial at law, civil or criminal, is a matter resting in the sound discretion of the primary court, and its action is not revisable on error.

4. The second instruction given by the court is free from error. The possession and use of the means or instruments of crime is always an important fact, which, if unexplained, raises unfavorable presumptions. One found in the possession of a forged instrument of which he purports to be the beneficiary, and applying it to his own uses, must, in the absence of explanation, be presumed to have fabricated it, or to have been privy to its fabrication. It is difficult to conceive that he could have the possession unless he had fabricated it, or assented to its fabrication; and the presumption grows stronger, when he uses or attempts to use it.—*State v. Britt*, 3 Dev. 122.

5. It was the duty of the court to affix the punishment following conviction, which must have been either imprisonment



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in the penitentiary, or hard labor for the county, for a term of not less than two, and not exceeding ten years.—Code of 1876, § 4342. A term of two years having been fixed upon, the court could elect whether it should be hard labor for the county, or imprisonment in the penitentiary. The law confides the discretion to the court.—Code of 1876 § 4450. Imposing hard labor for the county, the court properly imposed additional hard labor for the county for a term sufficient to cover all costs and officers' fees, etc.—Pam. Acts, 1880–81, p. 37; Code of 1876, § 4731.

We find no error in the record, and the judgment must be affirmed.

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### *Indictment for Gaming.*

1. *Betting at games prohibited by section 4207; sufficiency of indictment.*—Form 29, for an indictment under section 4209 of the Code, contains all the essential parts of an indictment for betting at a gaming table, or at a game called keno; but it is not full enough, when the charge is, that the accused bet at one or more of the games prohibited by section 4207 of the Code. An indictment under that clause of section 4209, to be sufficient, must aver both the betting, and that one or more of the enumerated games was played, at some one of the places named, by the accused, or by some other person or persons.

2. *Same.*—An indictment charging that the accused "played at a game with cards at a public house, and did bet or hazard money or bank notes at said game," does not charge two offenses, but charges only the graver offense denounced by section 4209 of the Code.

3. *When charge properly refused.*—Under an indictment for gaming, the evidence only tending to prove that the place at which the game was played was a private room, its sufficiency is a question for the jury; and hence, a charge requested by the defendant, which assumes that fact as proved, is properly refused.

4. *Gaming; parties charged with knowledge of character of place.* Parties who play at a game with cards must see to it, that they do not play in one of the places prohibited by the statute; and their want of knowledge of the character of the place is no excuse. Hence, a charge requested by a defendant indicted for betting at a game with cards at a public house, which instructs the jury that "when the evidence shows that the room in which the playing took place was a private room used as a dwelling, it is incumbent on the prosecution to show that the defendant knew, or had reasonable cause to know, that circumstances existed which would make it a public place in the sense of the law," is properly refused.

APPEAL from Madison County Court.

Tried before Hon. WILLIAM RICHARDSON.

[Johnson v. The State.]

The indictment in this cause charges, that Buck Johnson, the defendant in the court below, appellant here, prior to the finding thereof, "played at a game with cards at a public house, and did bet or hazard money or bank notes at said game." The defendant moved to quash the indictment on the ground that "the same charged, in a single count, two distinct and different offenses, punishable under the laws of Alabama with different punishments, to-wit: Playing cards at a public place, and betting money at a game of cards played at a public place." The court overruled the motion, and the defendant excepted. The bill of exceptions does not purport to set out all the evidence introduced on the trial, but only the following: "Upon the trial of said cause Iziah Fennell, a witness for the State, and Ben Cooper and Nelly Bynum, witnesses for the defense, testified that the room in which the defendant was charged with having played and bet at said game was the bedroom and dwelling of the said Nellie Bynum." The defendant requested the court in writing to charge the jury as follows: "When the evidence shows that the room in which the playing took place was a private room used as a dwelling, it is incumbent on the prosecution to show that the defendant knew, or had reasonable cause to know, that circumstances existed which would make it a public house in the sense of the law." This charge the court refused to give, and the defendant excepted.

Appellant's counsel not disclosed by the record.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—Section 4207 of the Code of 1876 declares that "any person who plays at any game with cards," etc., "at any tavern, inn," or various other named places, "must, on conviction, be fined not less than twenty, nor more than fifty dollars." This defines the offense of playing at one of the named public places, when nothing of value is bet or hazarded on the result of the game. Form 27, on page 994 of the Code, is expressly provided for, and adapted to this section. Section 4209 of the Code enacts that "any person who bets or hazards any money, bank notes, or other thing of value \* \* at any game prohibited by section 4207, \* \* must, on conviction, be fined not less than fifty, nor more than three hundred dollars." Form 29, same page of the Code, is in terms provided for this section—4209. Form 29 is very brief, and does not purport to be complete in itself. It contains all the essential parts of an indictment for betting at a gaming table, or at a game called keno; but it is not full enough, when the charge

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is that the accused bet at one or more of the games prohibited by section 4207 of the Code. To meet such a case as that, the indictment, to be sufficient, must allege, not only that the accused did bet or hazard, but must go farther and aver substantially all that is averred in form 27. In other words, the clause of 4209 which we are construing, being nothing more nor less than the offense denounced by section 4207, aggravated by the wager, or gambling ingredient, the indictment, to be sufficient, must aver both the betting, and that one or more of the enumerated games, and at some one of the places named, was played by the accused, or by some other person or persons. We say some other person or persons; for it is manifest that one who bets on such game, when played by others, is as much an offender of the statute, as he who both bets and plays. The indictment in this case does not charge two offenses. It only charges the graver offense denounced by section 4209 of the Code.—*Collins v. The State*, 70 Ala. 19; *Jacobson v. The State*, 55 Ala. 151.

The charge asked was rightly refused. It assumes as fact that the evidence showed the room in which the playing took place was a private room; or the language was susceptible of that construction. There was only testimony tending to prove that fact. Its sufficiency should have been left to the jury. It was objectionable also in its second aspect. Parties who play at a game with cards must see to it that they do not play in one of the prohibited places. Their want of knowledge of the character of the place, if it be one of those enumerated in the statute, is no excuse. A bedroom, or dwelling-house, may be used for some other purpose, which will make it one of the prohibited places.—1 Brick. Dig. 336, § 8; *Ib.* 339, §§ 59, 60, 61.

No costs will be allowed to the clerk of the circuit court for the return to the *certiorari*.

Affirmed.

## McElroy v. The State.

### *Indictment for Murder.*

1. *Venire in capital case; motion to quash.*—Under the provisions of the statute regulating the drawing and impanelling of grand and petit jurors in the county of Dallas (Pamph. Acts, 1882-3, p. 273; *Ib.* p. 446), the failure of the sheriff to find a person whose name is on the list of



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jurors drawn by the court, and ordered to be summoned for the trial of a capital case, is no ground for quashing the venire.

2. *Confession; when admissible.*—Confessions made in this case held admissible, although made while the defendant was under arrest for the crime charged, and to the persons making the arrest.

3. *Charge; when free from error.*—Where, on the trial of a defendant for the murder of his wife, the evidence tended to show that the defendant killed his wife by wantonly striking her with an ax, a charge instructing the jury, that the law presumes that every person intends to do that which he does, and that the defendant must be presumed to have designed, not only what he did, but also the necessary consequence of his act, unless he could show to the contrary, is free from error.

APPEAL from City Court of Selma.

Tried before Hon JON. HARALSON.

James McElroy, defendant in the court below, appellant here, was indicted for the murder of Mary McElroy, his wife, by striking or cutting her with an ax; and on the trial he was convicted of murder in the first degree, and sentenced to death by hanging. On the day set for the trial, and before the trial was begun, the defendant moved the court to quash the venire, on the ground, in substance, that among the number of jurors drawn and ordered to be summoned for the trial, was one Sneed Mays, "who had not been summoned by the sheriff, and was not then present in court." On the hearing of the motion, the court allowed the State to prove, against the defendant's objection, that the deputy, who had been charged with the duty of summoning the jurors, went to the house of said Mays for the purpose of summoning him as a juror in this case, and, arriving after dark, he was told by a person whom he could not see on account of darkness, but who was, judging from his tone of voice, a negro, that Mays was absent from home on a visit in Wilcox county, and that he would not return before the Monday of the next week; and that he thereupon returned said Mayo not found, without making any other effort to summon him. The court overruled the defendant's motion, and refused to quash the venire; and to this ruling, and to the ruling admitting the evidence offered by the State, the defendant duly excepted.

The State, after examining one Edith Craig as a witness, who testified "that she saw the defendant kill his wife, last fall, in Dallas county, with an ax, and to all the facts attending the killing," examined one James E. Kennedy as a witness, who testified that "he heard of the killing the morning it was done; that he got Mr. Lovett to go with him in pursuit of defendant, to apprehend him, and, on the way, they were joined by two young men, Mr. Edwards and Mr. King, and that they followed by his tracks in the road, and came in sight of him some seven or eight miles from where the killing



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occurred. Defendant was walking rapidly, and had his budget of clothes. We rode fast and passed him. When he came up, I arrested him. He surrendered at once. The others were a little way off when I arrested him, behind some bushes. I asked him if he killed his wife. He said, yes. I asked him why he killed her, or what he killed her for. He said he had the devil in him, or the devil made him kill her; I don't remember in which form he put it. I asked him, what he killed her with. He said he killed her with an ax. I then told one of the young men who had come up, to get a string and tie him. That was done. While tying him, or before we tied him, or about that time, defendant remarked: 'You have caught me, and, Captain, you can just take me out and hang me to a tree. I am ready to die.' We then started back, and a good deal was said, but I don't remember all he said. He talked freely to others, Edwards, Lovett and King, who were there." Preliminary to the introduction of the confession noted above, it was also shown that said Kennedy, when he came up to defendant, had "a double-barrel gun, at a present arms;" that defendant asked Kennedy not to shoot, in response to which Kennedy replied that he would not shoot if he, defendant, would surrender; that Kennedy "kept his gun so he could use it, until he knew that they had defendant safe;" that the defendant had known Kennedy for a long time; that nothing was said to the defendant tending to induce him to believe that it would be better for him "to tell it all;" that no threats were used, nor inducements offered; that the defendant seemed to be cool and reckless, and that witness, while he may have spoken in a prompt, firm tone, did not speak in an unusual tone. The defendant objected to the admission of the confession, on the ground, in substance, that it was not freely and voluntarily made; but the objection was overruled, and the confession admitted; and to this ruling the defendant excepted."

"The defendant then introduced Joe Edwards as a witness, who testified: "I went with Kennedy to arrest defendant. I was a good step off, near by, when he was arrested. I did not know what passed between Kennedy and defendant when he was arrested. I went up. I said, 'Jim, you killed your wife, or what did you kill your wife for; you are going to be hung for it.' He said the devil made him do it. I heard nothing that was said between him and Kennedy before. I went and got a line and tied him. On his way back he talked a good deal. Mr. Kennedy had his gun, a double-barrel, at a present, facing defendant, and close to him, until he was tied. Defendant had known witness and Kennedy a number of years, and he was very humble and obedient to white men."

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On the testimony of this witness, the defendant moved to exclude the confession made to the witness Kennedy; but the court overruled the motion, and the defendant excepted.

The defendant also reserved an exception to the following charge given by the court to the jury: "That the law presumes that every person intends to do that which he does; that he must be presumed to have designed what he did, or what is the necessary consequence of his act, unless he can show to the contrary."

S. W. JOHN, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The court, in our judgment, committed no error in overruling the motion made by the defendant to quash the *venire*. The ground of this motion was the failure of the sheriff to find one of the jurors whose name was on the list of those drawn by the court and ordered to be summoned, in accordance with the provisions of the special law regulating the drawing and impanelling of grand and petit juries in the county of Dallas.—Acts 1882–83, pp. 273–278, 446.

It is one of the provisions of this law that where any person stands indicted in the city or circuit court of Dallas county for a capital felony, the judge shall make the usual order required by section 4874 of the Code, "commanding the sheriff to summon not less than fifty, nor more than one hundred persons, including those summoned on the regular juries for the week." It is also made his duty, in open court, to cause to be drawn from a "jury box" provided for by the statute "the number of names required, with the regular jurors for that week, to make the number named in said order," and "shall cause an order to be issued to said sheriff to *summon said persons* therein named" to appear in court on the day set for the trial of the defendant.—Acts 1882–83, § 4, p. 449. It is made a contempt of court if the sheriff negligently fail to summon any person on this list.—§ 7, p. 450. There is nothing in the statute, however, which provides for the contingency of a failure by the sheriff to find any one or more of this list of jurors.

The record shows that the court made an order allowing the defendant fifty jurors, including the regular jurors impanelled for the week, of whom there appears to have been twenty-nine. The list of additional jurors drawn, as required by the statute, and furnished to the sheriff to be summoned by him, contained twenty-one names. One of this list, a man by the name of

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Myers, he failed to find, after making inquiry for him at his usual place of residence, where he ascertained that Myers was absent from home on a visit to another county. The return of the sheriff showed that this juror was not found. We are unable to see why this should be any ground for quashing the venire, especially in view of the offer of the solicitor, with the consent of the court, to place the name of the absent juror in the box, and when drawn to challenge him on behalf of the State. This offer, however, was unnecessary. It could not have been contemplated that the sheriff would always be able to find every juror whom he was ordered to summon. He must sometimes fail in the nature of probabilities. The court has literally pursued every step required by the statute, and the sheriff seems to have performed his duty properly. If the law operates unjustly in some cases, the remedy is for the legislative, and not the judiciary department.

The confessions of guilt made by the defendant were clearly voluntary, and therefore admissible. They are shown to have been made free from the influence of fear or hope applied to the prisoner's mind, and thus operating to induce them. The fact that the accused was under arrest at the time for the crime charged, as uniformly held, would not render his confessions inadmissible, whether made to an officer of the law or any other person.—*Aaron v. The State*, 37 Ala. 106; *Whart. Cr. Ev.* §§ 647-672; *Redd v. The State*, 69 Ala. 255; *Meinaka v. The State*, 55 Ala. 47. We find nothing in the facts of this case bringing it within the rule declared by this court in *Young & Griffin v. The State*, 68 Ala. 569, where certain confessions made by the prisoners were held inadmissible, because they were elicited by the terror of surrounding circumstances, suspicious and menacing in their character.

The evidence tends to show that the prisoner murdered his wife by wantonly striking her with an axe. The charge of the court, when construed, as it must be, in reference to the evidence, was unquestionably correct in declaring that the law presumes every person intends to do that which he does, and that the defendant must be presumed to have designed not only what he did, but also the necessary consequence of his act, unless he could show to the contrary. This charge involves a settled and elementary principle of law.—1 *Greenl. Ev.* § 18; 4 *Cooley's Bl. Com.* \* 222, n. (4); *Clark's Man. Cr. Law*, § 182.

We discover no error in the record, and the judgment of the city court, with the sentence of death which it has pronounced upon the prisoner, must be affirmed.



## Holley v. The State.

### *Indictment for Murder.*

1. *Indictment; signature of solicitor.*—The signature of the solicitor, with a designation of his circuit, is proper, but not essential to the authentication or sufficiency of an indictment; and where, in the absence of the solicitor for the circuit, an attorney is temporarily acting in that capacity, under the appointment of the court, his signature to an indictment, with the designation of “solicitor pro tem.,” is proper.

2. *Murder; admissibility of evidence.*—On the trial of a defendant indicted for murder, the vest worn by the deceased at the time he was killed, and perforated by the shot, may be produced and exhibited to the jury.

3. *Charge to the jury; when free from error.*—Reading to the jury, as part of the court’s general charge, extracts from reported decisions of this court, accompanied with instructions adapting them to the particular case, is free from error.

4. *Murder; when charge misleading.*—On the trial of a defendant indicted for murder, a charge requested by him embodying the instruction that he can not be convicted of murder in the first degree, “*unless he had murder in his heart,*” having a tendency to confuse and mislead the jury, is properly refused.

5. *Same; self-defense.*—To authorize, on the trial of a defendant indicted for murder, instructions touching the law of justifiable homicide, there must be evidence tending to show that there was, in fact, or the circumstances generated a reasonable belief of, the existence of a present, imperious necessity, not resulting from the wrongful act of the defendant, for him to take the life of the deceased, to avoid the loss of his own life, or to avoid grievous bodily harm; and when there is no such evidence, such instructions are abstract, and, for that reason, properly refused.

6. *Same; when charge on law of self-defense properly refused.*—It is not an honest, but a reasonable belief of a necessity to take life, that will justify a homicide; and hence, a charge requested by a defendant on trial for murder, instructing the jury that if they believe from the evidence, that the defendant, at the time he fired the fatal shot, *honestly* believed that it was necessary for him to kill the deceased, etc., they must acquit, is properly refused.

7. *Murder in first degree; meaning of malicious as used in statute.* While the term *malicious*, as it is used in the statute defining or describing murder in the first degree, is construed as signifying a killing perpetrated with a fixed hate, or with wicked intentions, or motives, not the result of sudden passion, this fixed hate or wicked intentions or motive may be instantaneous, and of it there need have been no previous manifestation.

8. *Failure to write “given” on charge given at defendant’s request; can not be taken advantage of on motion in arrest of judgment.*—The omission of the presiding judge to write “given” upon instructions requested by the defendant in a criminal case, and given to the jury, as required by the statute, is not an error of which advantage can be taken on a motion in arrest of judgment.

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APPEAL from Tuscaloosa Circuit Court.

Tried before Hon. JOHN MOORE.

Scip Holley, the defendant in the court below, appellant here, was indicted for the murder of Luther Sealley, and was convicted of murder in the first degree, and sentenced to be hung.

The only eye-witness to the killing examined on behalf of the State, so far as disclosed by the bill of exceptions, was Howard Sealley, the father of the deceased, whose testimony was, in substance, as follows: On the 19th January, 1884, between eleven and twelve o'clock in the forenoon, the deceased received a gun-shot wound, "the gun at the time it was fired being in the hands" of the defendant, and from the effects of this wound he shortly afterwards died. The defendant had lived on the witness' plantation, in Tuscaloosa county, during the year 1883, from which he was preparing to move on the morning of the killing. George Sealley, another son of witness, had charge of this plantation, hired the hands, etc., but did not live thereon; and at the time of the killing the defendant was indebted to the said George, who had requested his father to collect said indebtedness from defendant. About eight o'clock on the morning of the killing, witness saw defendant, and told him that he must pay George Sealley before moving, or leave his gun, which he then had with him, as security, or else he could not move his things off the place. Defendant replied: "I won't do it. I'll go to Squire Parks [a justice of the peace] and get my things," and then left, carrying his gun with him. In two or three hours defendant went to his house on the place, the witness following him. At the time, a wagon, loaded with defendant's "things," was standing in front of the house, and the defendant ordered the driver to drive off. To this witness objected, telling defendant that he could not move his "things" until he paid what he owed George, or left his gun as security for it. About this time Luther Sealley "came up for the first time," and said to the defendant, "Scip, leave the gun, or wait until George comes." When Luther commenced talking to him, the defendant changed the position of the gun, cocked it and held it in front of him, with the barrels resting across his left arm, and holding by his right hand, so that the butt of the gun extended under his right arm. The defendant having replied, "I won't do it," walked off, carrying his gun in the same position. After he had gone about thirty-five steps Luther called him and told him to stop a moment. Defendant stopped, and turned partly around towards Luther, who was walking towards him. "Luther walked up to within about two feet of him, remonstrating with him, and said to him,

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‘Scip, leave the gun and go and get the money and settle the matter.’ Defendant replied, ‘I won’t do it,’ and immediately shot him. Luther threw his hands up to his side, and said, ‘He has killed me.’ Before the shooting, neither the witness nor Luther said an angry word, or spoke in an angry manner or tone to the defendant.” The defendant’s tone, however, when spoken to about leaving the gun, was that of an angry man. The testimony of this witness further tended to show that there had been no quarrel between the parties; that the gun was loaded with small shot; that Luther made no threat, nor did he attempt to take the gun from the defendant; and that when defendant started off, immediately preceding the killing, “he said he was going to get the money to pay George.” During the examination of this witness, he was asked by the solicitor for the State, “In what part of the body was Luther Sealley shot.” The witness then produced a vest, which, he testified, was the vest worn by Luther Sealley when he was shot, and held it so the jury could see it, and pointed out to them the hole therein, which, he said, was made by the shot. The defendant objected to the witness being permitted to exhibit the vest to the jury for said purpose; but the court overruled his objection, and he excepted. It was also shown on behalf of the State, that as soon as the gun fired, the defendant walked off some little distance, and then began to run, and “ran as far as he was seen.”

The only evidence offered on behalf of the defendant was a showing for a continuance as to what one Wash Stewart would testify, the contents of which were substantially as follows: That said witness was present at the killing and saw the shooting; that at the time the shooting occurred, the defendant had the butt of his gun under his arm; “that deceased was advancing on defendant to take defendant’s gun away from him, and the defendant was stepping backwards, and trying to keep out of his reach; and that the gun was fired accidentally, and was discharged without being elevated or changed from its position;” that the defendant was moving that morning and carried his gun with him before he had any controversy with any one; that the gun would go off “half-cocked,” and could in that way be discharged; that defendant did not appear to be angry when the shooting occurred, and seemed greatly alarmed after the fatal shot was fired; and that the defendant had no quarrel with the deceased, but was perfectly friendly with him. The bill of exceptions purports to set out all the evidence, the material portions of which are here given.

The court, in the charge given *ex mero motu*, read, as a portion of the charge, extracts from the opinions of this court in



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the cases of *Mitchell v. The State*, 60 Ala. p. 28, and *Ex parte Brown*, 65 Ala. p. 447. To these extracts, which need not be here set out, exceptions were duly reserved.

The defendant then asked the court in writing to give the following charges: (1) "The jury can not convict the defendant of murder in the first degree, unless they firmly believe from the evidence that he had murder in his heart when he fired the fatal shot." (2) "If the jury believe from the evidence that the defendant, at the time he fired the fatal shot, honestly believed that it was necessary for him to shoot the deceased, in order to protect his person or property, then the jury can not legally convict him of murder in the first degree." (3) "That under the evidence in this case, the deceased had no legal right to take the gun forcibly from the defendant; that if he had done so, just before the fatal shot was fired, when the evidence shows that he was contending for the gun, it would have been robbery; and if the defendant believed, when he fired the fatal shot, that the deceased was about so to take the gun from him, then he had a right to shoot, to prevent the robbery; and he can not be convicted of murder in the first degree." (4) "If the jury believe from the evidence, that the defendant had no previous malice against the deceased, then this is a circumstance which may raise a reasonable doubt in the minds of the jury, taken in connection with the other evidence in this case, as to whether the killing was willful and intentional; and if the jury have a doubt as to this matter, then they can not convict the defendant of murder in the first degree." (5) "If the jury believe the evidence, they can not legally convict the defendant of murder in the first degree."

A motion was made by the defendant in arrest of judgment, the grounds of which are sufficiently indicated in the opinion.

Name of appellant's counsel not disclosed by the record.

II. C. TOMPKINS, Attorney-General, for the State.

BRICKELL, C. J.—1. The objection taken to the indictment can not be sustained. An indictment receives its legal efficacy from the finding and return of the grand jury; and the legal evidence of its verity is the return "a true bill," apparent upon some part of it, bearing the signature of the foreman. The signature of the solicitor, with a designation of the circuit in which he is the law-officer of the State, is proper, but it is not essential to its authentication or sufficiency.—*Ward v. State*, 22 Ala. 16; *Harrall v. State*, 26 Ala. 52. The present indictment bears the signature of

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the solicitor *pro tempore* appointed by the court, in the absence of the solicitor of the circuit, for the particular term. As the appointment was temporary, limited to the particular term, his relation to the court is precisely expressed by the designation appended to his signature—*solicitor pro tem.* Any other designation would not have been true.

2. There was no impropriety in the production and exhibition to the jury of the vest of the deceased, worn at the time of the killing, and perforated by the shot.—Burrill on Cir. Ev. 437.

3. Reading to the jury as instructions extracts from reported judicial decisions, or from text books, not accompanied with instructions adapting them to the particular case, it may be, is reprehensible, because of its tendency to confuse and embarrass, rather than to enlighten them. The extracts from the decisions of this court, which were read by the presiding judge in the course of his general charge, embody only settled principles of the law of homicide, which it is the duty of the court in some appropriate form to state to the jury in all cases similar in facts to the present case. These extracts were not submitted as mere abstract rules or principles of law; for it is apparent they were accompanied with instructions designed to aid the jury in their application. Of these instructions there is no complaint; and there is no room for any other presumption than that they were appropriate and just.

4. The first instruction requested by the defendant was properly refused; it is so framed and expressed that its immediate tendency was to confuse, if not to mislead the jury. The material inquiry was, whether the homicide was committed willfully, deliberately, maliciously, and with premeditation. It may be said, there could not have been a concurrence of these elements, unless the heart of the defendant was depraved—unless, in the language of the instruction, he had *murder in his heart*. That depends upon the construction which the instruction may receive from the jury; and if it be the true and only construction of which it is justly susceptible, it is obvious the mere statement of the abstract proposition would have been confusing and embarrassing, unless followed by an explanatory instruction, directing the attention of the jury to the necessary ingredients of murder in the first degree. Instructions requested, having a tendency to confuse or mislead, or which require explanation or qualification, are properly refused.—1 Brick. Dig. 339, §§ 660–61.

5. It is not clear or apparent that the evidence authorized instructions touching the law of justifiable homicide. The error is, perhaps, too common, that such instructions are appropriate whenever the killing occurred on a sudden quarrel, or in

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a sudden affray. But to authorize them, there must be evidence tending to show that there was in fact, or the circumstances generated a reasonable belief of, the existence of a present, imperious necessity, not resulting from the wrongful act of the defendant, for him to take the life of the deceased, to avoid the loss of his own life, or to avoid grievous bodily harm. But in this case, that consideration may be waived with the remark, that it is of the highest importance, in all cases, civil or criminal, that instructions to the jury should have their origin in a state of facts of which there is evidence, or which there is evidence tending to prove; otherwise, they are abstract. The first of these instructions affirms that an honest belief of a necessity to take life will justify a homicide. It is not an honest, but a reasonable belief, that justifies. An honest may not be a reasonable belief; it may be the offspring of fear, alarm or cowardice, or it may be the result of carelessness, and irrational. A reasonable belief, generated by the attendant circumstances—circumstances fairly creating it—honestly entertained, will justify a homicide; but not an irrational belief, however honest it may be.—*Oliver v. State*, 17 Ala. 587; *Harrison v. State*, 24 Ala. 67. The second instruction is equally, if not more objectionable. It is enough to say of it, that if the evidence has any tendency to show an intent on the part of the deceased, or an attempt by violence to take the gun from the defendant, if the intent and attempt had been consummated, robbery could not possibly have been imputed to the deceased. A felonious intent, the intent to steal, is as essential to the commission of robbery, as it is to the commission of larceny. The only intent imputable to the deceased, if the gun had been taken violently from the hands of the defendant, would have been an intent to compel the defendant to pay a debt due to the brother of the deceased; this was not a felonious intention, though it would not excuse or mitigate the trespass committed in the taking.—2 Bish. Cr. Law, §§ 849, 1162a.

6. Murder in the first degree, as it is described and defined by the statute, is of four kinds or classes, which were carefully enumerated and distinguished in *Mitchell v. State*, 60 Ala. 26; and it is not now necessary to repeat the classification and distinction. This homicide, if it be murder in the first degree, falls within that species described in the statute, to distinguish it from all other species, as “any other willful, deliberate, malicious, premeditated killing.” The elements or qualities of the offense being declared so particularly, it is essential that each and all should concur and co-exist; the absence of either, if it does not relieve the act of all criminality, at least reduces it to some other degree of criminal homicide. *Malicious*, as



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the term is used in the statute, is construed as signifying a killing perpetrated with fixed hate, or done with wicked intentions or motives, not the result of sudden passion.—*Mitchell v. State, supra.* The fixed hate, or the evil intent or purpose may be instantaneous—there may not have been any previous manifestation of it; hence, we find it constantly laid down in the books, in reference to malice as the element of murder at common law, and as the element of murder in the first degree under statutes dividing felonious homicide into degrees, that it is enough if it exists at the instant of the killing, although it may be at a period of time inappreciably distant.—Whart. Hom. §§ 32–33. The obvious error of the instruction requested by the appellant, which, it is supposed, it was intended should direct the attention of the jury to an inquiry into the presence or absence of malice, is, that it attaches an undue importance to the want of previous malice on the part of the defendant towards the deceased, and hence, was calculated to mislead, unless followed by explanatory instructions. A court may properly refuse an imperfect instruction—an instruction which needs modification, qualification or explanation. The instruction is also wanting in precision and definiteness; it is difficult to discover from it the precise point which it was intended to raise. It has long been the practice of this court on error not to revise the refusal of instructions which are wanting in certainty. Such instructions are calculated to mislead the primary court and to confuse the jury.

7. A motion in arrest of judgment must be founded on matter apparent on the face of the record. Extraneous matter may be the subject of a motion for a new trial, but is not available on motion to arrest the judgment.—*Blount v. State*, 49 Ala. 383. The omission of the presiding judge to indorse “given” upon the instructions requested by the defendant, and given to the jury, was not an error of which advantage could be taken on a motion in arrest of judgment. It was matter of exception at the time it occurred, but none was taken; and the failure to take the exception was a waiver of the error.

We have given the record a careful examination and patient consideration, not unwilling to find error which would justify a reversal of the judgment, and a grant of another trial to the defendant. We have not found it; and our duty is an affirmation of the judgment. As the day for the execution of the defendant has passed, another day will be appointed by the judgment of this court.

## Kelly v. The State.

### *Indictment for an Attempt to have Carnal Knowledge of a Female under Ten Years of Age.*

1. *Infant of tender years; competency of as a witness.*—The sole reason that infants of tender years are not allowed to testify as witnesses is, that they do not, at the time their testimony is offered, comprehend and realize the danger and impiety of falsehood; and hence, that an infant was of too tender years to be sworn, at the time of the occurrence of the transaction, about which he is afterwards called to testify, does not render him incompetent, but is merely a circumstance that bears on the weight of his testimony.

2. *Same.*—That an infant female was incompetent to testify on a former trial of a defendant charged with an attempt to have carnal knowledge of her, and was then so adjudged by the court, does not effect her competency on a subsequent trial of the same case, had after new trial granted.

APPEAL from Wilcox Circuit Court.

Tried before Hon. JOHN MOORE.

The facts are sufficiently stated in the opinion.

JOHN Y. KILPATRICK, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The charge on which defendant was tried and convicted, was an attempt carnally to know a female child under ten years of age. When the attempt is alleged to have been made, the child was a little over six years of age. There were two trials; the first, when the child was between seven and eight years old. The presiding judge did not then allow her to testify, he not being satisfied she had sufficient knowledge of the binding obligation of an oath. The accused was nevertheless convicted without her testimony. A new trial was granted.

At the second trial—spring term, 1884—the child, on examination, was adjudged to be competent, and she testified. She was then over eight years old. We are not informed what questions were propounded to her, nor what answers she gave, and hence are not called upon to determine the sufficiency of the evidence she furnished of her competency to testify. The court ruled her competent. She was examined and cross-examined as a witness before the jury, and the defendant

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“objected to all that said witness had testified to in regard to the commission of the said alleged offense on her by the defendant, and the particulars thereof, and moved the court to exclude the same from the jury, on the ground that the said witness, having been held by the court to be incompetent to testify at the last term of this court, could not now testify to any thing which occurred before said last term, though now competent to testify as a witness.” This motion was overruled, and defendant excepted. This is the only question raised by the record.

The question raised is, not whether the witness, when she gave evidence, was competent to testify. That does not appear to be denied. The real objection is, that, at a time subsequent to the occurrence of the acts she testified to, she was deficient in that intelligent sense of accountability, which our laws make a condition precedent to giving sworn testimony. On principle, this objection would seem to be unfounded. If a witness, when testifying, is competent, what matters it that there was a time when he was incompetent? The reason—the sole reason—that infants of tender years can not testify is, that they do not comprehend and realize the danger and impiety of falsehood, not that there may have been a time when they did not comprehend it. That the witness was of tender years—too tender to be then sworn as a witness—when the transaction occurred, about which he is afterwards called to testify, is a circumstance bearing on the weight of his testimony, not its legality. If the infant be of sufficient years and discretion to know what occurs, to remember it, and to give an intelligible account of it, and, when examined, comprehends the danger and impiety of falsehood, he is a competent witness. The weight of his testimony is for the jury.—*Morea's case*, 2 Ala. 275; *Carter v. The State*, 63 Ala. 52. In 1 Phil. Ev. (4th Amer. Ed.) 13, it is said: “In many cases, undoubtedly, the statements of children are to be received with great caution; but it is clear a prisoner may be legally convicted upon such evidence alone and unsupported; and whether the account of a child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given.” So, in Roscoe's Cr. Ev. 113, it is said to have been the agreement of all the English judges, “that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath.” And in Whar. Cr. Ev., § 366, it is said: “The testimony of a child between four and five, and that of a child between six and seven, have been received on the trial of an indictment for an attempt to ravish.



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And we may regard it as settled, that wherever there is intelligence enough to observe and to narrate, there a child, having a due sense of the obligation of an oath, can be admitted to testify."— *Wade v. State*, 50 Ala. 164.

We think this case is brought directly within the influence of *Carter's case*, 63 Ala. 52; and the judgment of the circuit court must be affirmed.

This being a capital case, and the day set for the execution of the prisoner having passed, it is ordered by the court that Friday, the 29th day of August next, be set for the execution of the sentence of the law; and that on that day the prisoner be hanged by the the neck until he is dead. The sheriff of Wilcox county will execute this sentence in the manner prescribed by law.

## Snoddy v. The State.

### *Indictment for Grand Larceny.*

1. *Confession: when sufficient corroboration of the testimony of an accomplice.*—The confession of a defendant indicted for the larceny of a hog, a felony under the statute, that he was present when the hog was killed, and aided in carrying away the carcass, though coupled with a denial of his complicity with the killing, is a sufficient corroboration of the testimony of an accomplice, to authorize a conviction under the statute prohibiting a conviction for a felony on the testimony of an accomplice, "unless corroborated by other evidence tending to connect the defendant with the commission of the offense."

APPEAL from Greene Circuit Court.

Tried before Hon. S. H. SPROTT.

The facts are sufficiently stated in the opinion.

J. B. HEAD, for appellant, cited *Hunt v. State*, 55 Ala. 138; *Smith v. State*, 59 Ala. 104; *Marler v. State*, 67 Ala. 55; Code, 1876, § 4895.

H. C. TOMPKINS, Attorney-General, for the State, cited *Smith v. State*, 59 Ala. 104; *Levy v. State*, 49 Ala. 390.

SOMERVILLE, J.—The defendant is indicted for the larceny of a hog, which is a felony under the statute. The main witness, whose testimony implicates the defendant in the commission of the crime charged, is an accomplice.

The State sought to corroborate this testimony by evidence

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of the defendant's confession made to one Rose, the owner of the animal which was killed and stolen. The question presented for decision is, whether this confession tends to *connect the defendant with the commission of the offense*, within the meaning of the statute, which prohibits a conviction of felony on the testimony of an accomplice unless corroborated by other evidence of this character.—Code, 1876, § 4895.

The defendant admits, in his confession, that he was present when the hog was killed, but denies his complicity in the act itself. He admits, however, that he aided in carrying the animal away after being killed.

In *Hunt v. The State*, 55 Ala. 138, we held that the statute had reference to *live* animals described, and not to their carcasses after they were killed. The stealing of the carcass would be petit larceny and not a felony, unless it exceeded the sum of twenty-five dollars in value.—Code, 1876, § 4358.

It is insisted by the appellant's counsel that, under this construction of the statute, the defendant can not be convicted of stealing the live hog unless he participated in the killing, and that a mere aiding in carrying off the meat, after the animal was dead, is insufficient. In our opinion, there can be no doubt of the soundness of this position, but the defect in its application is, that the confession of the defendant *tended* to show his participation in the killing, as well as in the act of carrying off the carcass. He confesses that he was present when the killing took place. This was sufficient to authorize the jury to conclude that he was a participant in the act, in as much as he immediately reaped the fruits of it by aiding in carrying away the carcass. It is no answer to this, that the defendant denied the fact of such participation. The settled and elementary rule as to confessions is, that the whole of what the defendant says on the subject, at the time of making the confession, must be admitted in evidence, and should be construed together by the jury. But all parts of the confession are not entitled to equal weight or credit. The jury may believe that part which inculcates the prisoner, and reject that which is exculpatory, if they see sufficient reason for doing so. What one charged with crime may say in his own favor may be rejected as unworthy of credit, while an admission against interest, or confession of guilt made at the same time, or in the same conversation, may be accepted as very probably true. 1 Greenl. Ev. §§ 219, 201; Whart. Cr. Ev. § 688.

It was for the jury to determine the weight or degree of credit which should be attached to the confession, and to say whether it satisfactorily corroborated that portion of the statement of the accomplice which connected the defendant with the commission of the offense, which here may be assumed to

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be the act of killing the animal charged to be stolen.—*Marler v. The State*, 67 Ala. 55; *Marler's case*, 68 Ala. 580; *Smith v. The State*, 59 Ala. 104.

The judgment of conviction must be affirmed, as we discover no error in the rulings of the circuit court.

## Bell v. The State.

### *Indictment for Petit Larceny.*

1. *County court of Wilcox; trial of misdemeanor without a jury.* The provision of the general law creating the county court and clothing it with jurisdiction of misdemeanors, that if a trial by jury is not demanded, "the judge shall determine both the law and the facts, without the intervention of a jury," etc. (Code, § 4718), applies to the jurisdiction of the county court of Wilcox as enlarged by the special statute of February 23rd, 1881 (Pamph. Acts, 1880-1, p. 295).

2. *Same; when decision on facts can not be reviewed.*—When parties waive the intervention of a jury, and substitute the court as the trier of the facts, the decision of the court upon the facts is the equivalent of the verdict of a jury, and can not be reviewed on appeal.

3. *Complaint in county court for larceny; when sufficient.*—A complaint in the county court for petit larceny, which names the offender, and avers the property taken and its ownership, and designates the offense charged with reasonable certainty, by words and phrases which, in common and legal parlance, would be employed to designate it, is sufficient, although it does not contain an averment of the time when the offense was committed; that it was before the complaint was made, being included in averments referring to it as a past matter.

### APPEAL from Wilcox County Court.

Tried before Hon. JOHN PURIFOY.

Thorn Bell, the appellant, was charged in the court below with the offense of petit larceny, the complaint on which the warrant was issued, and on which the trial was had being in these words:

"The State of Alabama, } County Court.  
Wilcox County. } I have probable cause for believing and do believe, that the offense of feloniously taking and carrying away two turkeys, of the value of one & 50-100 dollars, the property of W. W. Moore, has been committed in said county by Thorn Bell, *alias* Thorn Hill, on the ——— day of ———, 18——.

"JESSE J. MOORE.

"The above subscribed and sworn to before me this 5th day of Nov., 1883.

"JOHN PURIFOY, County Judge."



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The opinion does not render it necessary to set out the facts disclosed by the evidence. The judgment of conviction, after finding the defendant guilty, sentences him to pay a fine of ten dollars and costs. Then, after reciting that the defendant has failed to pay the fine and costs, his personal presence in court, and that he had nothing to say why the sentence of the law should not be passed upon him, it further sentences him to hard labor for Wilcox county for a designated period for the payment of the fine, and for another designated period for the payment of the costs, the amount of which is stated. Then follows a suspension of the judgment pending this appeal.

HOWARD & BECK and JONES & JONES, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

PER CURIAM.—1. The statute under which the present proceedings were had, and the judgment of conviction rendered, enlarges the jurisdiction of the county court of Wilcox in cases of misdemeanor, and secures to the party accused a right to trial by jury, if he makes a demand thereof before the first day of the next regular term of the court after he is arrested or taken into custody. A subsequent section of the act applies to prosecutions in the court “all laws of a general nature now in force, or that may be hereafter enacted, so far as the same apply to misdemeanors,” etc.—Pam. Acts, 1881–81, p. 295, *et seq.* The general law creating the county court and clothing it with jurisdiction of misdemeanors, conferred the right to a trial by jury, if it was demanded, and it was obtained through the medium of an appeal to the circuit court. If a trial by jury was not demanded, it was declared, “the judge shall determine both the law and the facts, without the intervention of a jury,” etc.—Code, 1876, § 4718. This statutory provision applies to the enlarged jurisdiction of the county court of Wilcox, and the result is, that the judge can be substituted to the place of the jury, and become the trier of the facts only by the consent of the accused—only by his waiver of the intervention of a jury. When parties waive the intervention of a jury, substitute the court as the trier of the facts, the decision of the court upon the facts is the equivalent of the verdict of a jury, and can not be reviewed on error.—See authorities collected in *Nooe v. Garner*, 70 Ala. 446. We can not, therefore, examine the evidence and determine whether it is of that degree and quantity to establish guilt of a criminal offense. The law attaches to it the quality of conclusiveness in that respect, when assailed on error.

2. The complaint is not insufficient. It pursues substan-  
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tially the statute. The offense with which the accused is charged, is designated and described with reasonable certainty, by words and phrases which, in common and legal parlance, would be employed to designate it; the offender is named, and the property taken and the ownership are averred; that is all the statute requires, and all that is necessary for the security and protection of the defendant. An averment of the time the offense was committed is not necessary; that it was before the making of the complaint is included in the words referring to it as a matter past, as having been committed.—Code, 1876, § 4702.

3. We can not perceive any error in the judgment and sentence of the court.

Affirmed.

## Howard v. The State.

### *Indictment for Living in Adultery.*

1. *Burden of proof, when death a material issue.*—When a person is shown to have been in life at a particular period of time, and seven years have not passed without intelligence from or concerning him, if the fact of his life or death becomes material, upon the party asserting death the law devolves the burden of proof.

2. *Presumptions of life and of innocence; nature of.*—In criminal cases, the presumption of life may not, under all circumstances, or generally, outweigh the presumption of innocence which the law indulges. Neither presumption is absolute, but both are disputable; and the weight to be attached to each must be determined by the facts of the particular case.

APPEAL from Choctaw Circuit Court.

Tried before Hon. WM. E. CLARKE.

This was an indictment for living in adultery or fornication, against Sim Howard and Lou Smith; and on the trial both were convicted. The evidence introduced on the trial tended to show that about three years prior to the trial, the defendant Howard removed from North Carolina to this State, accompanied by a woman he called his wife, whom he claimed to have married in the former State, they bringing with them children, and taking up their residence in Choctaw county; that about eighteen months prior to the trial said defendant returned to North Carolina, taking with him his wife and children, his mother-in-law and the defendant Smith, the latter then being a single woman, who had lived in Howard's family during his

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residence in said county; that after an absence of two weeks, Howard returned to said county, bringing back with him only his mother-in-law, his children and the defendant Smith; that nine months after their return from North Carolina, defendant Smith gave birth to a child; and that the defendants "lived together in said county as man and wife all last year, and up to the time the indictment was found. This being all the evidence, the court charged the jury, among other things, that the law placed the *onus* on the defendants to show that his wife was dead;" and to this charge the defendants excepted.

Name of appellants' counsel not disclosed by the record. (No brief came to the hands of the reporter.)

H. C. TOMPKINS, Attorney-General, for the State.—The record presents but one question. The evidence showed that Howard was a married man, and that his wife was living within three years before the trial. The charge excepted to, in effect, instructed the jury that the presumption was, that she was living during the time of the commission of the act or acts charged. There certainly can be no question of the correctness of this instruction. The presumption of the law was, that the first wife was living; and, to overthrow that presumption, the burden was on the defendants to show that she was divorced.—1 Greenl. on Ev. § 41; *Williams v. State*, 34 Ala. 131; 2 Whart. Am. Law, § 1706.

BRICKELL, C. J.—There is no error in the instruction given to the jury by the circuit court. When a person is shown to have been in life at a particular period of time, and seven years thereafter has not expired without intelligence from or concerning him, if the fact of his life or death becomes material, upon the party asserting death the law devolves the burden of proof.—1 Green. Ev., § 41. In criminal cases, the presumption of life may not, under all circumstances, or generally, outweigh the presumption of innocence which the law indulges. Neither presumption is absolute; either is disputable; and the weight to be attached to either must be determined by the facts of the particular case. It is most plain, from the circumstances of this case, that if the wife of the accused died before the commission of the offense with which he is charged, of the fact he had special knowledge, and especial opportunities and means of proving it. A few months only had passed since she was in life, under his care and protection; and her death without his knowledge, if not impossible, was improbable. If a dissolution of the marriage, by death or otherwise, would have acquitted him of guilt, under these cir-



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cumstances, the law cast upon him the burden of proving it. Affirmed.

## Lee v. The State.

*Indictment under the Statute securing Payment of Fines and Costs in Criminal Cases.*

1. *Constitutional inhibition against imprisonment for debt: what not a debt within meaning of.*—Neither fines, forfeitures, nor costs in criminal cases, are debts within the meaning of the constitutional provision, “That no person shall be imprisoned for debt.”

2. *Same; what act not violative of.*—This constitutional provision is not violated by the act of the General Assembly, approved February 23rd, 1883, entitled “An act to better secure the payment of fines and costs in criminal cases in the courts of this State” (Pamph. Acts, 1882-3, p. 166).

APPEAL from Marengo Circuit Court.

Tried before Hon. WM. E. CLARKE.

The first section of the act under which the indictment in this case was preferred, provides “that when any person is convicted and fined in any of the courts of this State, and contracts with any person or persons to confess judgment with him as his security or securities for the payment of the fine and costs incident to such conviction, and by such contract he agrees, in consideration of such person or persons becoming such security or securities, to do or perform any thing, act or service for such security or securities, he shall in all things comply with the provisions of said contract;” then follows certain provisos touching the approval and record of the contract. By the second section it is provided, “that if said person so convicted shall leave or escape from such service, he shall be guilty of a misdemeanor, unless he shows to the jury by whom he is tried a good and sufficient excuse for such refusal or failure, and, on conviction of such misdemeanor, he shall be fined not more than five hundred dollars, and not less than the amount or value of the damages which the party so contracting with him has suffered by such refusal or failure. *Provided*, That in all prosecutions under this act, the prosecutor and defendant shall be competent witnesses.” The third section provides “that so much of the money arising from the payment of the fine mentioned in section two hereof, as shall be sufficient to pay the damages provided for therein, shall be paid to said party who suffers such damages, by the officer or

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person who collects such money, as soon as the same is received and collected." And by the fourth and last section of the act, it is provided that it shall take effect from the date of its passage.

The facts are sufficiently stated in the opinion. The defendant was convicted, and from the judgment of conviction he takes this appeal.

EUGENE McCAA, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—Section 21 of the Declaration of Rights declares, "That no person shall be imprisoned for debt." In *ex parte John Hardy*, 68 Ala. 303, we considered this clause of the Constitution at great length, and held that where the foundation of the injury complained of was the non-payment of a debt—a debt created by contract,—then by no device could the debtor be imprisoned for its non-payment. We limited the exemption to contract liabilities; for it is manifest that fines, forfeitures, mulcts, damages for a wrong or tort, are not a debt within this clause of the Constitution. Certain duties are cast on all citizens for the welfare of society; to serve on juries, to work the public roads, to testify as witnesses, to act as a *posse comitatus*, when thereto lawfully summoned, and when a citizen, by his own misconduct, exposes himself to the punitive powers of the law, the expense incident to his prosecution and conviction, each and all of these may result in subjecting the defaulter to a money liability. These are not debts incurred by contract *inter partes*, but are the result of being members of the social compact, or body politic.—*Ex parte Hardy, supra*; *Caldwell v. The State*, 55 Ala., 133; *Cain v. The State, Ib.* 170; *State, use, etc. v. Allen*, 71 Ala. 543; *Wightman v. Wightman*, 45 Ill. 167; *State v. Bauerman*, 72 Ala. 252.

An illustration of this principle may be drawn from *Caldwell v. The State, supra*. We there held that a convicted defendant could be sentenced to imprisonment, or hard labor, for the non-payment of the costs of his conviction. Such costs were only a money liability, but they were not a debt contracted. They were but the expense incident to the maintenance of the law. So, if one indicted be out on bail, he is under a contract to his surety, express or implied, that he will appear at the proper court, and submit himself to be tried. Yet, while he is so at large on bail, his bail or surety may arrest him on his own mere will, deliver him into the custody of the sheriff, and the latter may and must consign him to prison, unless he give other satisfactory

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bail. This is not imprisonment for debt, but a mere method of relieving his surety of a money liability, incurred by contract.—*Cain v. The State, supra.*

The appellant in this case was indicted under the act "to secure payment of fines and costs in criminal cases," approved February 23rd, 1883.—Sess. Acts, 166. There was a demurrer to the indictment, alleging the unconstitutionality of the statute, which the court overruled. The particular objection to the statute is, that it authorizes imprisonment for debt. We do not so understand the statute. The charge against the defendant was, not that he refused to pay a debt he had contracted, but that he ran away from the hard labor imposed on him as a punishment for the offense he had committed. He had not worked out the sentence to hard labor, to which he had been condemned. The statute was conceived in the most humane spirit, and offers to convicted offenders the opportunity of selecting their own task master, the kind of service they will render, and of having a voice in the measure of compensation. All these advantages the statute secures to them, if they are so fortunate as to find a friend who will trust them. The confessed judgment, and the contract approved by the court, do not satisfy the offended law, nor pay the penalty imposed. They are but the condition on which the offender is permitted to select how and whom he will serve, in satisfying the broken law. No one would question the constitutionality of a statute, making it indictable for one sentenced to hard labor, to escape or flee from the service. We regard the present statute as substantially that identical thing, tempered to the offender by a humane impulse; and hence, we hold it constitutional.—4 Cooley's Blackstone, 5, note 3.

The judgment of the circuit court is affirmed.

## Hughes v. The State.

### *Indictment for Arson.*

1. *When objection to testimony not available on appeal.*—When objection is made to a question propounded to a witness, and is overruled by the court, but the record fails to show that any answer whatever was given to the question, the ruling of the primary court on the objection is not available on appeal.

2. *Charge; when invasive of province of the jury.*—The weight to be given evidence is a question for the jury; and a charge which withdraws it from their consideration, is an invasion of their province.

3. *Same; when argumentative.*—A charge asked, which asserts that



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the "law-books are full of cases of mistaken identity," is argumentative, and, for that reason, is properly refused.

4. *Conviction of felony; personal presence at commission of offense, not necessary to.*—Under our statute abolishing the common law distinction between an accessory before the fact and a principal, and between principals in the first and second degrees, in cases of felony, etc. (Code, 1876, § 4802), it is not necessary to the conviction of a defendant indicted, with others, for arson in the first degree, that he should either have himself set fire to the house, or have personally "assisted" any other person in so doing.

APPEAL from Jackson Circuit Court.

Tried before Hon. H. C. SPEAKE.

At the fall term, 1883, of said court, George Hughes, Asbury Hughes, John W. Grayson and George Smith, defendants in the court below, were indicted for willfully setting fire to, and burning "the dwelling house of Henry Porter, in the night-time, in which said house there was, at the time, a human being, to-wit, Henry Porter, against the peace," etc.; and, at the next term thereafter, they were tried and convicted, and were sentenced, in accordance with the verdict of the jury, the said George Smith, Asbury Hughes and George Hughes to be hung, and the said John W. Grayson to imprisonment in the penitentiary for life.

The evidence introduced on behalf of the State clearly showed, and it was not controverted, that on the night of the 25th March, 1883, between the hours of eight and nine, the residence of Henry Porter was willfully set on fire, and by the fire soon thereafter destroyed; and tended strongly to show that the defendants were the guilty agents; their identity having been testified to by witnesses, and circumstances pointing to their guilt, not necessary to be here stated, having been shown. Miss Standish, a lady who resided at the Porter residence at the time of the fire, was examined as a witness on behalf of the State, and she testified to the circumstances attending the commission of the offense, and identified the defendants as the guilty parties. She testified, *inter alia*, that "she did not recognize George Hughes and Grayson until the house was on fire, when she saw them standing under an apple tree, about one hundred steps from the house." It was shown that three trunks, among other things, were removed from the burning house, in one of which was a phial of medicine belonging to one of the ladies residing at the house; that, during the fire, these trunks were carried off; and that about six weeks or two months after the fire, the phial of medicine was found at the house of one Mrs. McKinney, where the defendant Smith stayed, and whom, after the fire, he married; and information was there obtained which led to the recovery of one of the trunks. The State also examined one Bain for

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the purpose of proving statements made by the defendant Grayson, and by others of the defendants, tending to connect them with the commission of the offense.

The defendants each set up an *alibi* in defense, and each introduced some evidence in support thereof. The defendant Grayson examined, among other witnesses, one S. H. Ingersoll, who testified that said defendant was with witness at Shellmound, Tennessee, about three miles distant from where the fire was, between the hours of half past seven and nine of the night of the fire; and that they first saw the light of the fire about half past eight o'clock. An exception was reserved on the admissibility of evidence, but the facts in reference thereto are given in the opinion.

The defendant Smith asked the court in writing to give the following charge: (1) "The fact that the phial of medicine in evidence found some weeks after the house-burning, at the house where Smith stayed, was the property of one of the inmates of the Porter residence, is a circumstance to be considered by the jury in determining the guilt or innocence of said defendant, but it is by no means conclusive of his guilt. Standing by itself, it is not sufficient to justify the jury in finding him guilty." The court refused this charge and said defendant excepted. The defendants asked the court in writing to give the following charge, which the court refused, and they excepted: (2) "The law-books are full of cases of mistaken identity and, in considering the evidence in this case as to the identity of either one of these defendants, as being present at the house-burning, and their participating in it, the jury must feel an abiding confidence and full faith, that the witnesses who have undertaken to identify these defendants, or either of them, are not mistaken in their testimony; and in this connection, the jury may look to the circumstances surrounding the witnesses at the time, to determine whether the witnesses were in a condition of mind to observe and note, with care and accuracy, the appearance of the parties about whom they have testified." The defendants Grayson and Asbury and George Hughes also separately excepted to the refusal of the court to give to the jury the following charges requested by each of them in writing: (3) The jury will look to what S. H. Ingersoll said as to the time when Grayson left Shellmound, and to the time when Miss Standish said she saw him in the orchard, after the house was burned down, and if from this evidence they conclude that Grayson was not there when the house was set on fire, and did not help burn the house, then they will find the defendant not guilty." (4) "If the jury believe from the evidence, that Grayson was at Shellmound at 9 o'clock on Sunday night, March 25th, 1883, and after the Porter house was

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on fire, and was there when the fire was discovered, then, unless the evidence shows that he, Grayson, between 10 and 11 o'clock, did some act in furtherance of the burning, they will find the defendant not guilty." (5) "If the jury believe from the evidence, that Grayson did not set fire to the house of Porter, or assist in setting fire to the house of Porter, then the jury will find the defendant not guilty." (6) "That to constitute arson, the person must, in the night-time, set fire to a house in which a person was at the time of setting such house on fire, or was, at the time, aiding and abetting others in setting the house on fire, *then* the jury will find the defendant Grayson not guilty." (7) "If the jury believe from the evidence, that the defendant Grayson made no confession, but that what was said to Bain was only restating what was said at the preliminary trial, then they will find the defendant Grayson not guilty."

Name of appellants' counsel not disclosed by the record.

II. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The defendants were indicted, tried and convicted of the crime of arson in the first degree—a capital felony under the statutes of this State. The particular offense charged is the willfully setting fire to, or burning, in the night-time, the dwelling house of one Henry Porter, in which there was at the time a human being, to-wit, the said Henry Porter.

The bill of exceptions taken by the prisoners shows but a single exception to the introduction of evidence. On cross-examination of a witness for the State—one Fitch—the prisoners' counsel had asked him if Mr. Porter and Miss Standish, who were inmates of the house at the time of the burning, and who had testified to the identity of the prisoners, did not withhold the names of persons whom they suspected as the guilty parties, and whether they did not do this in witness' presence; and this question had been answered in the affirmative.

On re-examination the court permitted the State to ask the witness "what *reason*, if any, did Mr. Porter and Miss Standish assign for withholding the names of the persons whom they suspected." An objection was interposed to this question by the defendants, but was overruled by the court.

The record fails to show that any answer whatever was made to this question, and this alone is a sufficient reason why no error can be predicated upon the mere asking of the question. *Roberts v. The State*, 68 Ala. 515; *Eagle, etc. Man'g Co. v. Gibson*, 62 Ala. 369; *Jackson v. Olopton*, 66 Ala. 29.

The answer, moreover, if made, may have been clearly relevant.

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vant. It may have disclosed the fact that the silence of the witnesses was induced by prudence arising from apprehension of harm, or from a desire to conceal the facts until proper warrants of arrest were made, securing the arrest of the suspected parties. In any aspect of the case, we see no error in the ruling of the court.

The first charge requested by the defendant Smith was an invasion of the province of the jury and was properly refused. Whether the evidence alluded to in the charge was conclusive of the defendants' guilt or not, was a question for the jury, and not for the court. This charge was also misleading, for the reason it seems to assume that the possession of the stolen property in question was the only evidence of guilt, whereas this evidence was corroborated by other circumstances of an inculpatory nature.

The second charge was misleading on the ground of its tendency to withdraw from the jury all criminative evidence except that touching the positive identity of the prisoners by the witnesses who swore to their recognition on the night of the alleged burning. The jury might have convicted on other testimony than that of positive identity, and hence, it was not requisite that they should feel "an abiding confidence and full faith" that the witnesses were not mistaken in the fact of such identification by personal recognition. This charge was also argumentative in asserting that "the law books are full of cases of mistaken identity"—a fact which was neither proved on the trial, nor was it permissible to be proved. The court did not err in its refusal.

The third, fourth and fifth charges requested by the defendants were erroneous in assuming that the defendant Grayson could not be convicted of complicity in the crime charged, unless he was personally present at the time of the burning of the house. He may have been absent from the place, at the time of the actual burning, and have still been guilty as a principal in the first degree.

It was not necessary to the conviction of either of the defendants that he should either have himself set fire to the house of Porter, or have personally "assisted" any other person in doing so. There is no distinction, under the statutes of this State, between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, the common law distinction in this particular being expressly abolished, and "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present," are authorized to be indicted, tried and punished as principals.—Code, 1876, §4802.

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The sixth charge asked by defendants and refused by the court was also erroneous in assuming that, to charge a defendant with the crime of arson, he must either himself have perpetrated the burning, or have aided and abetted others, *at the time*, in doing so. This is obviously incorrect, for an accessory before the fact, as we have seen, though not a chief actor in the offense, nor present at the time of its perpetration, is held to be as guilty as a principal.

The seventh charge requested by the defendants was properly refused for more than one sufficient reason. It was, in the first place, unsupported by any evidence, as far as concerns the hypothesis that Grayson's confessions made to the witness Bain were not confessions, but a mere restatement of what was said at the preliminary trial. It would, moreover, have been an invasion of the province of the jury to instruct them to acquit Grayson on the testimony connecting him with the crime charged, exclusive of his confessions.

We discover no error in the record, and the judgment of the court must, therefore, be affirmed as to each of the several defendants. It is accordingly ordered and adjudged that, on Friday, the first day of August, 1884, the sheriff of Jackson county execute the sentence of the law by hanging the said defendants, George Smith, Asbury Hughes and George Hughes, each by the neck until he is dead, in obedience to the judgment and sentence of said circuit court as herein affirmed.

## The State v. Leach.

### *Indictment under the Statute securing Payment of Fines and Costs in Criminal Cases.*

1. *Statute not violative of constitutional inhibition against imprisonment for debt.*—The provision of the Constitution declaring, "That no person shall be imprisoned for debt," is not violated by the act of the General Assembly, approved February 23d, 1883, entitled "An act to better secure the payment of fines and costs in criminal cases in the courts of this State (Pamph. Acts, 1882-3, p. 166).

APPEAL from Chilton Circuit Court.

Tried before Hon. JAMES E. COBB.

The indictment in this case was preferred under the act of the General Assembly, entitled "An act to better secure the payment of fines and costs in criminal cases in the courts of this State (Pamph. Acts, 1882-3, p. 166). The defendant hav-

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ing been convicted, moved in arrest of judgment, on the ground that said act was unconstitutional. The court sustained the motion, arrested the judgment, and discharged the defendant, and the State prosecutes this appeal.

H. C. TOMPKINS, Attorney-General, for the State.

J. M. FALKNER, *contra*.

STONE, J.—On the authority of the case of *Lee v. The State*, at the present term [*ante*, p. 29], the judgment of the circuit court arresting the verdict and judgment of a previous day, is reversed, annulled, and held for naught; and the judgment of conviction, rendered on the verdict of guilty, is re-instated and re-established. And the circuit court will execute the sentence of the law, pronounced on the conviction. Let this order be certified to the court below.

Reversed and remanded.

## Calloway v. The State.

### *Indictment for Selling or Giving Spirituous Liquors to a Minor.*

1. *Trial by court without jury; when finding not reviewable by this court.* When a defendant charged with a misdemeanor is tried by the county court of Sumter county, without the intervention of a jury, under the provisions of the statute regulating the trial of misdemeanors in that county (Pamph. Acts, 1882-83, p. 214), the decision of the court upon the facts is equivalent, in legal effect, to the verdict of a jury, and, in the absence of statutory power, can not be reviewed by this court on appeal.

APPEAL from County Court of Sumter.

Tried before Hon. W. R. DELOACH.

The facts are stated in the opinion.

J. J. ALTMAN, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The defendant is indicted for selling or giving spirituous liquors to a minor—the case having been transferred, under the statute, from the circuit court to the county court of Sumter.—Acts 1882-83, p. 214, sec. 2.



[Ex parte McGlawn.]

A special statute, regulating the trial of misdemeanors in this county, after authorizing such transfer, provides that the defendant "shall be entitled to a trial by jury, but should he waive the same, *the court* shall make an entry thereof, on the record, and *shall proceed to hear and determine the case.*" And an appeal from the judgment of the county court is allowed in such cases as from the trial of misdemeanors in the circuit courts of the State under the general law.—Acts, 1882-83, *supra*, sections 6 and 10.

The record shows that a jury was waived, and that the case was submitted to be tried by the court.

Our uniform rulings in cases of this character have been, that when parties waive the intervention of a jury, and substitute the court as the trier of the facts as well as of the law, the decision of the court upon the facts is equivalent in legal effect to the verdict of a jury, and can not be reviewed on error.—*Nooe v. Garner*, 70 Ala. 443, and cases cited on p. 447; *Summers v. The State*, 70 Ala. 16.

In *Bell v. The State*, delivered at the present term [*ante*, p. 25], the precise point was decided in conformity with the foregoing principle, the appeal being one from a county court, where the accused waived his right to a jury, and the facts were tried by the court. We declined to examine the evidence and determine whether it was of that degree and quantity to establish guilt of a criminal offense, observing that "the law attached to it the quality of conclusiveness in that respect when assailed on error." The rule, in other words, is this, that in as much as the finding of a jury on the facts by verdict is never reviewable in this court by appeal, or writ of error, so when the judge is substituted for the jury, his finding on the facts is not reviewable, whether in cases civil or criminal, unless the statute authorizing the appeal, expressly or by necessary inference, confers this particular jurisdiction on the appellate court.

The judgment of the county court must, in view of this principle, be affirmed.

## ***Ex parte McGlawn.***

### *Habeas Corpus.*

1. *Habeas corpus: irregularity of commitment no ground for.*—On *habeas corpus*, it is no ground for the discharge of a prisoner committed by a magistrate for a criminal offense, that the commitment is irregular.

2. *Same; commitment prima facie cause for detention.*—On *habeas*  
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*corpus*, a commitment by a magistrate raises a *prima facie* cause for detention; and when un rebutted by testimony, the prisoner should not be released.

APPLICATION to this court for writ of *habeas corpus*, relief having been denied by Hon. DAN GORDON, Judge of Probate of Henry county.

The facts are sufficiently stated in the opinion.

J. A. CLENDINEN, for petitioner.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The petitioner was arrested on two warrants of arrest, issued by a justice of the peace, each charging the crime of hog stealing. The complaints on which the warrants were issued are not in conformity with the statute.—Code of 1876, §§ 4648–9. The warrants of arrest and of commitment are substantially correct.—Code, §§ 4651, 4682. The application to the primary court, renewed in this court, apparently claims the discharge of the prisoner, on the ground that the complaints before the justice of the peace did not authorize the issue of the warrants of arrest. It is no ground for discharge on *habeas corpus*, that the “commitment was irregular.” Code § 4963.

In the trial before the judge of probate, no testimony was offered, nor does it appear that the solicitor of the circuit, or the prosecutor was notified.—Code, § 4946; *Ex parte Mahone*, 30 Ala. 49; *Ex parte Champion*, 52 Ala. 311; *Callahan, v. The State*, 60 Ala. 65. In the absence of all proof or testimony given before him, except the warrants of commitment attached to the sheriff’s return, we think the judge of probate rightly ruled that the petitioner had failed to show he was entitled to his discharge. The commitments themselves, on that inquiry, raised a *prima facie* cause for detention; and being un rebutted, the court was without warrant to order the prisoner’s liberation.

Application for *habeas corpus* denied.

[Dover v. State; Ex parte Dover.]

**Dover v. State; Ex parte Dover.***Murder; Habeas Corpus.*

1. *Murder; effect of failure to find degree of.*—A verdict in a murder case, finding the defendant “guilty as charged in the indictment, and assessing his punishment to imprisonment for life in the State penitentiary,” but failing to find the degree of the homicide, while it presents a reversible error on appeal, will, on *habeas corpus*, support a judgment of conviction.

APPEAL from Bibb Circuit Court.

Tried before Hon. JAMES E. COBB.

Peter Dover, the appellant and petitioner in these cases, having been indicted and tried for murder, the jury returned into court a verdict in these words: “We, the jury, find the defendant guilty as charged in the indictment, and assess his punishment to imprisonment for life in the State penitentiary.” This verdict was received by the court, and after being polled by the defendant, the jury were then discharged by the court from the further consideration of the case. Soon after they were discharged, and after they had dispersed, and some of them had left the court house, and after the court had proceeded to other business, they were reassembled, and caused by the court to again retire to consider their verdict. They thereupon returned another verdict, like the first in all particulars except that it fixed the degree of the homicide as murder in the first degree. “Before receiving the last verdict the court swore severally the members of the jury, and on their oaths they severally stated that they each distinctly ascertained and agreed that the defendant was guilty of murder in the first degree as charged in the indictment, before they returned their first verdict, and so intended and agreed to say in their first verdict.” Thereupon sentence was passed on the defendant by the court in accordance with the verdict. The defendant duly excepted to the action of the court, above noted, and also moved in arrest of judgment on the grounds, in substance, (1) that the verdict was insufficient to support the judgment of the court; (2) that the verdict was void, and no judgment could be pronounced thereon; and (3) that having been once in jeopardy of his life for said offense, he could not again be tried therefor, and, therefore, no legal cause existed for his further detention. This motion the court overruled.



[Dover v. State; Ex parte Dover.]

The defendant sued out a writ of *habeas corpus*, and also appealed. The first opinion *infra* was delivered on the application for the writ of *habeas corpus*; the second on the appeal.

WOOD & WOOD and HARGROVE & LOGAN, for appellant and petitioner.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—The present application is not distinguishable in principle from the question ruled on in *Waller v. The State*, 40 Ala. 325, 333. In that case it was contended that the prisoner ought to be discharged from custody, “on the ground that, upon the verdict as originally returned into court, no sentence could have been pronounced, and that he was entitled to judgment of acquittal thereon.” This court replied, that it could not assent to such a proposition. And in 1 Bish. Cr. Proc. § 1016, it is said: “If the jury bring in a defective verdict, it is in the power equally of the prisoner and the prosecuting attorney to have it set right; and suppose the prisoner chooses not to interfere, and suffers a defective verdict to be entered, as his interest would always prompt him to do, in preference to a verdict of guilty in due form, he, by thus failing to interfere, waives his objection to being put a second time in jeopardy for the same offense.”—1 Bish. Cr. Law, § 998; *Com. v. Gibson*, 2 Va. Ca. 70; *Com. v. Smith*, *Ib.* 327; *Com. v. Scott*, 5 Grat. 697; *State v. Sutton*, 4 Gill, 494; *Wright v. The State*, 5 Ind. 527; *State v. Redman*, 17 Iowa, 329; *State v. Walters*, 16 La. Ann. 400; *State v. Spurgin*, 1 McCord, 252.

There was no want of jurisdiction of person, or of subject-matter in this case. The defect in the verdict may present a reversible error. *Habeas corpus* is not the remedy.—*Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18.

The writ of *habeas corpus* is denied.

PER CURIAM.—Reversed and remanded, on authority of *St. Clair v. Caldwell and Riddle*, and authorities therein cited, 72 Ala. 527; *Waller v. The State*, 40 Ala. 325; *Storey v. The State*, 71 Ala. 329. The prisoner will remain in custody until discharged by due course of law.

[The State, for the use, etc., v. Metcalfe.]

## The State, for the use, etc., v. Metcalfe.

### *Action on Promissory Note.*

1. *Convicts; when contract for hire of illegal.*—In the absence of action on the part of the commissioners' court, determining in what manner and on what particular works the labor of convicts shall be performed (Code, 1876, §§ 4465, 4468), the judge of probate has no authority to act; and hence, a contract for the hire of a convict made by him, in such case, is illegal and void as against public policy, and no recovery can be had thereon against the hirer.

APPEAL from Marion Circuit Court.

Tried before Hon. H. C. SPEAKE.

This was an action of assumpsit by the State of Alabama, for the use of Marion county, against Oscar Metcalfe and James P. Pearce; and was founded on a promissory note executed by the defendants on 19th October, 1881, and payable to the plaintiff for the use, etc., on 19th December, 1882. The defendants pleaded (1) "the general issue;" (2) "want of consideration;" and (3) "special plea that the note sued on was not made in pursuance of law, but in contravention thereof."

On the trial, as shown by the bill of exceptions, the plaintiff offered in evidence the note declared on, which, omitting the signatures and date, is in these words: "On or before the 19th day of December, 1882, we or either of us promise to pay the State of Alabama, for the use of Marion county and the officers of the court, one hundred and twenty-six dollars, for the hire of Oscar Metcalfe, who was sentenced to hard labor for said county of Marion six months to pay his fine, and eight months to pay the costs against said Oscar Metcalfe, at the fall term of the Circuit Court of Marion county, Alabama." It was shown that the Oscar Metcalfe mentioned in the body of the note was a different person from the defendant bearing the same name. In connection with the note the plaintiff offered in evidence "the record of the prosecution, conviction and sentence of Oscar Metcalfe for the offense of an assault and battery," had in said court, which is set out in the bill of exceptions, and shows that the said Metcalfe was indicted for carnally knowing or abusing in the attempt to carnally know a designated female under the age of ten years, and that on 8th October, 1881, a judgment was entered, which, after reciting the appearance of the parties, proceeds: "And the defendant

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having been arraigned by having the indictment read to him, for plea thereto, says, he is guilty of a simple assault, and the solicitor, by consent of the court, accepts said plea; and the defendant, being asked if he had any reason to give why the sentence of the law should not be pronounced against him, says nothing. It is thereupon ordered by the court that the defendant be and he hereby is sentenced to hard labor for the county of Marion for the term of six months, as a punishment for said offense; and the cost appearing to be one hundred and four 85-100 dollars, it is further ordered that he be sentenced to hard labor for said county for an additional term of eight months to pay the costs of said prosecution." The plaintiff also offered to prove in connection with said note, that on the day of the conviction the said Metcalfe was remanded to jail, where he remained until 19th October, 1881, when the defendants "entered into contract with, and hired said convict from" the judge of probate of said county, and executed and delivered to him the note sued on "for the hire and services of said convict for the term of his said sentence;" and that thereupon the sheriff delivered said convict to them, and they "took him and worked him and had the benefit of his services under said contract of hire as a convict to hard labor for the county of Marion during the term of said sentence." It was admitted by the plaintiff that "the court of county commissioners of said county had made no order regulating the kind of work that county convicts should be employed at, nor the manner of hiring them under section 4468 of the Code of Alabama, after the year 1878 or 1879 up to the time of hiring said convict."

On the defendants' objection, the court refused to allow said note to be read to the jury, and the plaintiff excepted, he taking a nonsuit with a bill of exceptions. This ruling of the court is here assigned as error.

II. C. TOMPKINS and T. B. NESMITH, for appellant.

WM. R. SMITH and J. B. SANFORD, *contra*.

SOMERVILLE, J.—The contract sued on was clearly void for illegality. Its consideration is shown to have been the hire of a convict, who had never been legally sentenced to perform hard labor. The hiring was done by the probate judge, without any order or authority of the commissioners' court, which alone had the power to authorize it. The whole system of hard labor for the several counties is placed by statute under the superintendence and control of the court of county commissioners, who are required to "determine in what manner



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and on what particular works the labor shall be performed." Code, 1876, §§ 4465, 4468. In the absence of any action by this body, the probate judge is without any power to act in such matters.—Code, § 4469. The act of hiring, therefore, was illegal, and the contract to pay for the convict's services was void as against the public policy. No plaintiff can recover when he requires aid from an illegal transaction in order to establish his cause of action. He must fail unless he can prove his cause without being "obliged to lay the foundation of his action in his own violation of the law."—*Ala. G. S. Railroad Co. v. McAlpine*, 71 Ala. 545; *Way v. Foster*, 1 Allen, 408; *Gunter v. Lecky*, 30 Ala. 591; 1 Whart. Law Contr. § 340.

The rulings of the circuit court are in harmony with these views, and its judgment must be affirmed.

## Bell & Co. v. Hurst & McWhorter.

### *Assumpsit for Money had and received.*

1. *Lien of landlord when advances made by another at his instance and request; operation of the statute.*—By extending the lien of the landlord so as to cover advances made by others at his instance and request, it was not intended to confer upon him the power to appoint another to make advances to his tenant, thereby clothing such person with the lien declared by the statute; but merely to afford him indemnity against any liability he might thereby assume for the tenant.

2. *Same; when does not exist.*—Hence, if the advances are made by a third person with the understanding, either express or implied, that he is to look to the tenant, and not to the landlord, for payment, although made at the instance of the landlord, and on his request, no liability resting on the landlord, there is no room for the operation of the statute, and the lien does not exist.

3. *Lien for advances; what necessary to its validity.*—When the statutory lien for advances is asserted, not only must the terms of the "written note or obligation" be in substantial compliance with the requirements of the statute, but all the articles advanced and for which the note is intended by the parties as a security, must be of the statutory class; and hence, the lien does not exist, when the note or obligation is founded, in part, on other considerations than the advances contemplated by the statute.

APPEAL from Lowndes Circuit Court.

Tried before Hon. JOHN MOORE.

This was an action of *assumpsit*, brought by Hurst & McWhorter against N. J. Bell & Co., to recover for certain cotton, part of a crop raised by one Cook on a designated plantation, on which the plaintiffs claimed to have a mortgage, and

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which the defendants had received from Cook and sold, with notice of plaintiffs' mortgage. The cause was tried on issue joined on the plea of *non-assumpsit*, the trial resulting in a verdict and judgment for the plaintiffs. As appears from the evidence set out in the bill of exceptions, Green Cook, having rented certain lands, known as the Gilchrist plantation, from K. L. Haralson and E. L. James, and being indebted to the plaintiffs, executed to the latter, on 17th November, 1880, a mortgage on the crops to be grown by him during the year 1881, on the rented place, which was duly recorded on 12th January, 1881. The evidence was conflicting as to whether the note secured by the mortgage evidenced a pre-existing debt, or a debt contracted contemporaneously with the execution of the note and mortgage. There was also some evidence that the defendants had actual notice of the plaintiffs' mortgage "in January or February, 1881." During the year 1881, Cook raised a crop of corn and cotton on the rented place, and of that crop the defendants received cotton to the value of about \$900. On the 14th January, 1881, Cook also executed to the defendants a mortgage on the crops to be grown on said place during the year 1881, and a note which was intended as a crop-lien note under the statute; and, as their testimony tended to show, they "supplied and furnished Cook, after 16th January, 1881, teams, provisions and farming implements or money to purchase the same and for other purposes, to the value of one thousand dollars, as shown by an account" attached to the bill of exceptions as an exhibit.

The defendants read in evidence an instrument in writing signed by Haralson and James, and dated 16th January, 1881, which is as follows: "We hereby request N. J. Bell & Co. to advance to Green Cook, our tenant on the Gilchrist plantation, the present year, and collect any or all such advances out of the crop after the rent has been paid to us; waiving all rights invested in us as landlords to N. J. Bell & Co.;" and they proved that the advances which they made to Cook "were furnished after the execution of the foregoing paper and on the faith thereof." The plaintiff moved to exclude said instrument from the jury; the court sustained the motion and excluded it from the jury; and to this ruling the defendants excepted. The other facts disclosed by the evidence, necessary to an understanding of the points decided, are stated in the opinion.

The defendants asked the court in writing to give the following charge to the jury: "If the jury believe from the evidence that the note executed by Green Cook, secured by the mortgage to the plaintiffs, was given for the extension of a debt made during the year 1880, and not for horses, mules, oxen or necessary provisions, farming tools and implements, or money

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to purchase the same, and they further find that the defendants did make advances in horses, mules, oxen or money to purchase the same to enable Green Cook to make a crop during the year 1881, and that Green Cook executed the note introduced in evidence to N. J. Bell & Co., and the same was recorded within sixty days, and the amount of such advances was equal to or exceeded the amount of the crop received by the defendants of Green Cook, then said note made by Green Cook to defendants is a superior lien to the plaintiffs', and the plaintiffs can not recover." This charge the court refused, and the defendants excepted.

The rulings above noted are here assigned as error.

WATTS & SON and HOUGHTON & TYSON, for appellants.

R. M. WILLIAMSON and COOK & ENOCHS, *contra*.

BRICKELL, C. J.—The statute declares a lien in favor of a landlord on crops grown on rented land for the rent of the current year, "and for advances made in money or other thing of value, whether made directly by him, or at his instance and request by any other person, or for which he has assumed the legal responsibility at or before the time at which such advances were made."—Code of 1876, § 3467. The lien is declared in favor of the landlord, and operates for his security and protection. By extending the lien so as to cover advances made by others at his instance and request, it was not intended to confer upon him the power to appoint another to make advances to his tenant, thereby clothing such person with the lien declared by the statute. Where the advances are not made to the tenant "directly" by the landlord, but by others "at his instance and request," the clear purpose of the statute is to afford him indemnity against the liability he thereby assumes for the tenant. If, therefore, the advances are made by a third party with the understanding, either express or implied, that he is to look to the tenant, and not to the landlord, for payment, although made at the instance of the landlord, and on his request, no liability resting on the landlord, there is no room for the operation of the statute, and the lien does not exist. The immediate circumstances surrounding the execution by Haralson and James, the landlords, of the paper-writing offered in evidence by the appellants, are not stated in the record. But it is clear, from the language of the instrument, especially when construed in the light of the preceding and subsequent conduct of the appellants, that it was not in the contemplation of the parties, that the landlords should become liable to the appellants for any advances which the latter might make to the



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tenant Cook. It is true there is a request that the appellants should advance to Cook, but this request is accompanied by language which rebuts the implication of liability which might otherwise spring from it. Though inaptly worded, it is manifest that both parties intended that the appellants were to look for payment to the tenant and to his crop, and to the crop only after the rent was paid. Such was evidently the construction placed on the instrument by the appellants at the time. Two days before, the tenant had executed to them a note, intended as a crop-lien note under the statute, and a mortgage, to secure advances which they agreed to make during the year. An account was opened with the tenant, and the advances, as they were made, were charged against him, and not against the landlords. The only legal effect the instrument can have is that of an agreement on the part of the landlords, that they would not advance to the tenant during the year, thereby imperiling the lien created by the note and mortgage executed to the appellants by the tenant. There was no error in the ruling of the circuit court excluding the writing from the jury.

The only remaining question arises from the refusal of the court to give the charge requested by the appellants. This charge is based on the theory that the appellants had a lien for advances made by them to Cook under section 3286 of the Code, and that this lien was superior to the prior mortgage executed by Cook to the appellees. The bill of exceptions does not purport to set out all the evidence introduced on the trial. It contains the note and mortgage executed by Cook to the appellants, and recites that the appellants introduced evidence tending to show that they supplied and furnished Cook, during the year 1881, with "teams, provisions and farming implements, or money to purchase the same, and for other purposes, to the value of one thousand dollars, as shown by account hereto attached." The first item of the account is a large balance carried over from the year 1880. Numerous items of cash paid to various parties at different times are also embraced in the account, without any explanation given of the purposes for which the money was paid or used. There are other items in the account which can not be affirmed, unaided by explanatory evidence, to come within the category of articles designated by the statute. The account also aggregates over two thousand dollars, while the note is only for one thousand dollars. What items contained in the account, formed the consideration of the note, constituted the advances intended by the parties to be secured thereby, the record fails to show. The note could not, in any event, as between the parties to this suit, operate as a security for a greater amount than that expressed in it.—*Collier & Son v. Faulk & Martin*,

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69 Ala. 58. To defeat the action of the appellees, who claim under a prior mortgage, and to maintain the correctness of the charge requested, the appellants must show that they had a valid lien under the statute for advances made to Cook, and that the proceeds of the crop received by them were not more than sufficient to satisfy and discharge that lien. This involves the necessity of showing, not only that the terms of the note executed by Cook, the tenant, were in substantial compliance with the requirements of the statute, but that the articles advanced came within the class of articles mentioned in the statute.—*Boswell & Wooley v. Carlisle, Jones & Co.*, 55 Ala. 554; *Evans v. English*, 61 Ala. 416; *Carter v. Wilson, Ib.*, 434; *Schuessler v. Gains*, 68 Ala. 556. This requires that all the articles advanced, and for which the note is intended by the parties as a security, should be of the statutory class. As we said in *Evans v. English, supra*, “Commingleing other debts, founded on other considerations, and a security for all, is not intended. Such security may be taken by mortgage or other appropriate instrument. But whatever may be the terms of the instrument, it is not the security the statute authorizes, and is not entitled to the statutory priority.” This principle was again announced in *Comer v. Daniel*, 69 Ala. 434, and it may now be considered as the settled rule for construing this class of contracts. Conceding, then, that the terms of the note are in substantial compliance with the statutory requirements, it is manifest, both from the recitals in the bill of exceptions, and from the account which is exhibited thereto, that the note is founded, in part, on other considerations than the advances contemplated by the statute; and, also in part, on considerations which are not shown to be within the class of articles intended to be secured as advances. This case is clearly within the rule announced in *Evans v. English* and *Comer v. Daniel, supra*. There was no error in refusing the charge requested.

Affirmed.

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**Clark v. Spencer.***Statutory Real Action in the Nature of Ejectment.*

1. *Contest of exemptions; by what law governed.*—Although the statute, after making express provision for determining the question of exemptions against debts contracted prior to the adoption of the Constitution of 1868, and against debts contracted since April 23d, 1873, fails to make any provision for determining such question as to debts contracted between those dates, harmony of proceedings requires that the courts should treat this as an accidental legislative oversight, and that, since the approval of the act of February 9th, 1877, the same mode, method and remedy should be observed in all cases of asserted homestead and other exemptions.

2. *Lien of execution; when continuity of not broken.*—Where executions have been regularly issued on a judgment, without the lapse of an entire term, the continuity of the lien is not broken by the fact that an execution issued on the judgment, which was so irregular, informal and imperfect that it would have been quashed on motion, was returned by the order of the plaintiff, and, on the same day, another execution, curing the defects of the first, was issued.

3. *Claim of exemption under sections 2828-29 of the Code; how made.* Where the claimant of an exemption seeks to conform to sections 2828 and 2829 of the Code of 1876, he should be governed, in the quantity and value of property he selects, by the date of the debts, against which he claims exemption; and if he owes debts falling within more than one of the classes recognized by the statute, he should, in his declaration and claim, specify what property he selects under each one of the classes.

4. *Same; when claim not void, though insufficient as against debt sought to be collected.*—A declaration claiming a tract of land in the country, containing eighty-eight acres, of less value than \$2000, as a homestead exemption, made and filed in the office of the judge of probate in due form, and in conformity to the provisions of section 2828 of the Code, being valid as against debts contracted after April 23d, 1873, is not void, although it is insufficient as against debts contracted prior to that date, and after the adoption of the Constitution of 1868, in that it does not select and designate which eighty of the eighty-eight acres are claimed.

5. *Same; should be contested, though insufficient as against debt sought to be collected.*—The declaration of exemption in such case not being void, although insufficient as against debts contracted after the adoption of the Constitution of 1868, and before the 23d April, 1873, before an execution issued for the collection of a debt of that class is levied on the property claimed, the plaintiff should contest the claim as provided in section 2830 of the Code of 1876; and a levy and sale made without such contest are irregular, and the levy may be quashed and the sale arrested or set aside, on timely application properly made.

6. *Claim of homestead exemption under section 2834; when should be allowed though defendant has conveyed the property.*—The defendant in execution having, in addition to such declaration, also lodged with the sheriff, after levy and before sale, a declaration under section 2834 of the Code of 1876, setting forth that, at the time of the rendition of the judg-



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ment, he owned and occupied as a residence the eighty-eight acres of land levied on, and continued to occupy them as a homestead until a designated time after the lien had attached, when he sold and conveyed them, and the purchaser had ever since owned and occupied them as a residence, and that the said land was worth less than \$2000, and, as vendor of the purchaser, he claimed the land as exempt from levy and sale under execution; and to this claim the purchaser having appended an affidavit, also claiming the land as exempt under the defendant's claim of exemption, and adding a description of eighty acres of the land which he selected in the event he was entitled to only eighty acres, *it was further held*, that this claim of exemption should have been allowed to prevail, if not successfully controverted; and that, the sheriff having disregarded it, and sold the land without a contest, the sale was irregular.

7. *Sale of homestead under execution after claim filed; when irregularities in, no defense to an action of ejectment.*—The levy and sale made under the execution, while irregular, are not void, nor can they be collaterally impeached; and hence, such irregularities constitute no defense to an action of ejectment by the purchaser, claiming under a conveyance made in pursuance of the levy and sale, the sale and conveyance not having been set aside.

APPEAL from Greene Circuit Court.

Tried before Hon. S. H. SPROTT.

The facts are sufficiently stated in the opinion.

JAMES B. HEAD, for appellant.—(1) After the declaration of homestead was filed and recorded, the land claimed became *prima facie* a valid homestead against any execution for debt, particularly, executions issued on judgments rendered subsequent to the time the declaration was filed. This *prima facie* showing can be overcome by no other mode than that prescribed by the statute.—Code, §§ 2830, 2831, 2838. And the burden of proof is on the creditor to show the claim is invalid. *Ib.* § 2838. Section 2830 imperatively forbids the levy of any execution, attachment, or other process for debt, upon the land embraced in the declaration; hence, the leviable quality of the land is destroyed, and the power of the sheriff, as the agent of the law, to sell and convey is suspended until the land is condemned to sale by the circuit court, as provided by section 2838. The proposition of the appellee is, that the machinery provided by the Code for ascertaining exemptions has no application to cases in which, on the final trial of the question of the validity of the homestead, it is found, from the weight of the evidence, that the debt was contracted between the ratification of the Constitution of 1868, and April 23d, 1873. It is evident the remedial provisions of the homestead act, contained in the Code, were not intended to be thus limited. It is true the *rights* of exemption given by that act apply only against debts contracted since April 23d, 1873, and before the adoption of the Constitution of 1868, but the machinery provided necessarily applies in all cases. It is not

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required that the declaration shall schedule the claimant's creditors, or give the dates of the debts. A general declaration, selecting and setting forth the property claimed, is all that is required. Section 2830, prohibiting a levy, is *general*, and applies expressly to *all process* for the collection of debt, without regard to whether the *right* of exemption is to be determined by the statute or by the Constitution. The purpose of the statute was to provide a speedy and efficient mode of determining all questions of exemptions in advance of a sale by the sheriff, and thereby prevent the sacrifice of property and avoid the many and perplexing difficulties which embarrass trials in ejectment, of which this record presents a fit illustration. See *Block v. Bragg*, 68 Ala. 291; *Kelly v. Garrett*, 67 Ala. 309; *Blum v. Carter*, 63 Ala. 235. The sheriff disregarded the plain letter of the law, and was a mere trespasser. (2) It is true that if a person permits the sale of his homestead, *without objection*, he waives it; but this is upon the principle of *implied consent—acquiescence*. But it can not be said with any show of reason, that when he actually claims and forbids the sale of that which he is entitled to, and more besides, he thereby *consented* to the sale of the *whole*, simply because he claimed more than it was afterwards ascertained he ought to have claimed. (3) The plaintiff in ejectment must be entitled to recover, not only at the commencement of the suit, but also at the time of the trial; and it is competent for the defendant—he being the defendant in execution—even on the trial, to select the homestead, if he had claimed and forbidden the sale of more than he was entitled to. (4) If the land was Spencer's homestead when he sold to Allen, then no claim of exemption by Spencer was necessary afterwards; but the purchaser can defend upon the homestead right of the vendor. *Cook v. Baine*, 37 Ala. 350; *Fellows v. Lewis*, 65 Ala. 348; *Steele v. Moody*, 53 Ala. 418. (5) The lien of Clark's execution was lost, as against Allen, by his order to the sheriff to return the execution. See *Carlisle v. Godwin*, 68 Ala. 137.

G. B. MOBLEY, *contra*.—(1) The law of the Code, title 6, part 2, chapter 1, does not apply to, or operate upon exemptions given by the Constitution of 1868. As to the debt, for the collection of which the execution in this case was issued, there is no provision of law authorizing appellant to file a declaration and claim of homestead. The filing of the claim, therefore, was a nullity, and conferred no rights upon him. The law in the Code, sections 2820 *et seq.*, was designed to inaugurate a new system as to the *quantum*, value, manner of claiming and manner of setting apart exempt property. This system was designed only to apply to, and operate upon debts

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contracted after April 23d, 1873.—Code, § 2820. It was then made to apply to debts contracted before the Constitution of 1868 became operative, “as to the mode, *method*, and remedy of asserting, ascertaining and determining the same.”—*Ib.* § 2844. But now here is this system made to apply to debts contracted between the adoption of the Constitution of 1868, and 23d April, 1873. The sale by the sheriff was, therefore, regular. (2) The Constitution requires the homestead to be *selected*, and if not selected before a sale, the claim comes too late.—60 Ala. 548; 62 Ala. 44; 63 Ala. 406; 67 Ala. 573; *Ib.* 558. As against the debt sought to have been collected in this case, Spencer could claim only eighty acres, and when he claimed the whole tract of eighty-eight acres, he failed to select the eighty acres he would claim. The claim of homestead lodged with the sheriff was long after the lien of appellee’s execution had attached. It was fatally defective.—63 Ala. 235; 62 Ala. 393; 60 Ala. 548. This was not done until after the sale to Mrs. Allen, and then it was done in her interest. The claim of a homestead exemption is a personal privilege, and the selection must be made by the defendant in the process. No provision is made for the claim of the homestead, and its selection, by and in favor of his alienee. (3) Spencer having failed to select and identify the homestead prior to the sale to Mrs. Allen, nothing remained in him after the sheriff’s sale except a bare equity to have the homestead ascertained, if that; and this equity can not defeat ejectment.—*Snedecor v. Freeman*, 71 Ala. 140.

STONE, J.—There are three systems of homestead and other exemptions in force in this State, dependent on the time the debt or debts were contracted, against which the exemption is claimed. First, when the debt or debts to which the property is sought to be made subject, were contracted before the Constitution of 1868 became operative. The extent and value of the exemptions under this class are governed by “the statute law which was of force when such debt or demand was contracted.”—Code of 1876, § 2844; Code of 1867, §§ 2880 to 2884. Second, when the debt or debts were contracted between the time the Constitution of 1868 went into effect, and the 23rd day of April, 1873. These are governed by the Constitution of 1868, as to their extent and value. Third, when the debt or debts were contracted after April 23rd, 1873. These are governed in their extent by the act of that date, and by the act approved February 9th, 1877.—Pamph. Acts, 32. By the last named act—§ 2844 of the Code—it was declared that in case of debts contracted before the State Constitution of 1868 became operative, the mode, method and remedy for as-



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serting, ascertaining and determining the claim of exemptions shall be the same as are provided in chapter 1, title 6, part 2 of the Code, commencing with section 2820. It will be observed that while this enactment makes express provision for determining the question of exemptions against debts falling within the first and third of the above classes, it does not mention the intermediate class—that of debts contracted between the time the Constitution of 1868 went into operation and April 23rd, 1873, an interval of nearly five years. We think harmony of proceedings requires that we should treat this as an accidental legislative oversight; and that after the enactment of the statute of February 9th, 1877, the same mode, method and remedy shall be observed in all cases of asserted homestead and other exemptions.

In a chancery suit in which Thomas C. Clark was complainant and John P. Spencer and others were defendants, instituted in the Chancery Court of Greene county, Clark recovered a money decree against said Spencer at the July term, 1879. The debt on which that decree was recovered was incurred in 1871. The terms of the Greene Chancery Court were then holden on the first Mondays in January and July.—Pamph. Acts, 1878-9, p. 99. On the 22nd day of October, 1878, Spencer, while the chancery suit was pending against him, made a declaration in writing, sworn to, in which he claimed his homestead, consisting of eighty-eight acres, as exempt from execution. The claim was in all respects formal and valid against debts contracted after April 23rd, 1873. The claim was of the entire tract, without any selection of eighty acres, or a less quantity. This declaration was duly filed with the judge of probate on the day it was made, and was duly recorded.

The first execution issued on the decree bore date October 22nd, 1879, and on the same day was received by the sheriff. This execution was made returnable on the first Monday in January, 1880, and was returned January 2nd, 1880, indorsed, "Returned for an *alias*." No steps were taken preliminary to the issue of this execution, nor at any other time under section 2830 of the Code. The second execution was issued and received by the sheriff January 5th, 1880. This was made returnable the first Monday in June, 1880, and, on 12th January, was levied on the lands in controversy. It was returned June 2nd, 1880, indorsed "levy discharged on claim of exemption filed." We suppose this has reference to the claim of exemption filed and recorded in October, 1878, noticed above. The third execution was issued December 2nd, 1880, returnable fourth Monday in January, 1881. This execution came into the hands of the sheriff December 3rd, 1880,

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and was returned by him "No property found," January 25th, 1881. The fourth execution is very informal and imperfect. Its date appears to be March 17th, 1871. It is made returnable (blank) Monday in (blank). It was received by the sheriff March 25th, 1881, and, April 14th, 1881, was again levied on the lands in controversy. On the 6th June, 1881, this execution was returned, with the sheriff's indorsement, "Returned for *alias pluries* by order of plaintiff." On the same day, June 6th, 1881, the fifth execution was issued and received by the sheriff. This execution was made returnable the first Monday in September, 1881. On the day this execution went into the hands of the sheriff—June 6th, 1881—another attempt was made to claim the property as exempt. Spencer made a new declaration on oath, setting forth that at the time said decree was rendered, he owned and occupied as a residence the eighty-eight acres of land levied on, and he continued to occupy them as a homestead until March 6th, 1880, when he sold and conveyed them to M. J. Allen, who has, ever since, owned and occupied them as a residence; that the said eighty-eight acres are worth less than two thousand dollars; and, as the vendor of said Allen, he claims that said lands are exempt from levy and sale under said execution. Mrs. Allen appended to this affidavit her claim to said land, as exempt under Spencer's homestead exemption, and added to it the following clause: "If she, the said Allen, is entitled under the exemption law to only eighty acres of said land, then she selects and claims all of said land except eight acres off the north end of said eighteen acre piece, described as lying in the south end of the east half of the southeast quarter of section 33, township 23, range 1, east." This claim was immediately lodged with the sheriff, and was the first time a selection was made limiting the quantity to eighty acres. The sheriff disregarded this claim, and on the first Monday in August sold the property, and Clark became the purchaser, receiving the sheriff's deed. He thereupon instituted this suit, which is a statutory real action for the recovery of the property.

Leaving out of view, for the present, the question of homestead exemption, it can not be gainsaid that the plaintiff acquired and retained a lien on the land in controversy from the time the first execution went into the hands of the sheriff, October 28th, 1879, until the sale was made by the sheriff, August, 1881, unless the return of what we have called the fourth execution, made as it was by order of plaintiff, broke the continuity of the lien. Excluding that execution entirely from the file and from consideration, there was not a lapse of an entire term between the return of one execution, and the receipt of another by the sheriff.—Code of 1876, § 3211. It

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is, however, contended for appellant that the plaintiff destroyed his lien in this case, by himself ordering the return of the execution. This is a misapprehension of the principle, which rests for its support on the voluntary interference of plaintiff, by which delay is granted to defendant.—*Albertson v. Goldsby*, 28 Ala. 711; *Carlisle v. Godwin*, 68 Ala. 137. The execution in this case was grossly irregular and imperfect, and would have been quashed on motion. It is shown, too, that indulgence or delay was neither granted nor contemplated; for the very day on which the execution was returned by order of plaintiff, another one was issued and placed in the hands of the sheriff. There is nothing in this objection.

We have shown above that before the plaintiff acquired any lien in this case by placing execution in the hands of the sheriff, Spencer, as whose property the lands were afterwards sold, had made his declaration in writing, and had it recorded, claiming the exemption of the said eighty-eight acres of land, as his homestead. There was no contest of the validity of that claim, as provided by section 2830 of the Code. The plaintiff procured the levy to be made, and the sale and conveyance to be perfected, without making any oath, or giving any bond, to contest the first claim, and without filing any contest to the second claim. In fact, no contest was ever had of the validity of either claim, as provided in the act approved Feb. 9, 1877. Each of these claims of exemption was offered successively in defense of this action, and each was, in effect, ruled to be insufficient.

Sections 2828 and 2829 of the Code of 1876 provide for a declaration of claims of homestead, exempt from legal process, and for having the same recorded. And section 2830 declares that “after the filing of such declaration and claim for record, no execution, attachment or other process for debt shall be levied on such property, unless the plaintiff, his agent or attorney, contest the validity of such claim in whole or in part,” in the manner pointed out in said section. The claim interposed in this case was sufficient in form, and, so far as we can perceive, was every way valid and formal, against debts contracted after April 23d, 1873. It was not, then, void, but was insufficient against debts contracted before that time. As to the debt on which plaintiff obtained his decree, being contracted between the time the Constitution of 1868 went into effect, and April 23d, 1873, it was insufficient, in that it did not select and designate which eighty of the eighty-eight acres, the occupant claimed. When the claimant of exemption attempts to conform to sections 2828 and 2829 of the Code, he should be governed, in the quantity and value of property he selects, by the date of the debts against which he claims exemption.



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*Randolph v. Little*, 62 Ala. 396; *Block v. Bragg*, 68 Ala. 291. And if he owes debts falling within more than one of the classes, then he should, in his declaration and claim, specify what property he selects under each one of the classes. We do not mean to say he should file a schedule of his debts. Sufficient if he say, as to debts contracted between the time the Constitution of 1868 went into operation, and April 23d, 1873, he selects and claims the following: (not exceeding eighty acres); and so on, for each class of debts he may owe.

The declaration and record of claim in this case, being only applicable to debts contracted after April 23d, 1873, was it necessary to controvert that claim before having execution levied? The declaration, as we have shown, was not void. It was valid as to one class of debts. To maintain uniformity and harmony of practice, we hold that before having the property levied on, the plaintiff should have contested the same, as provided in section 2830 of the Code. This preliminary step should be taken, whenever the declaration, claim and record are valid and sufficient as to any class of debts, against which exemptions are allowed. The execution should not have been levied in this case, and consequently the levy and sale were irregular. But we do not think they were void. They were only irregular. On timely application the court would have arrested the sale and quashed the levy; and would set aside the sale on timely application properly made. It can not be declared void on collateral attack.—*Masters v. Eastis*, 3 Por. 368; *Abercrombie v. Connor*, 10 Ala. 293; *Ware v. Bradford*, 2 Ala. 676; *Mobile Cotton Press v. Moore*, 9 Por. 679; *McCaskell v. Lee*, 39 Ala. 131.

To give harmony to our various rulings, and to give effect to the exemptions secured by our Constitution and statutes, we feel constrained to hold that the second claim of exemptions should have been allowed to prevail, if not successfully controverted. We have held in various forms that exempt property is not subject to legal process; and that any attempt to alienate the homestead, that does not conform to the statute, is so far inoperative, that, without prior selection, a subsequent conveyance which conforms to the Constitution and statute, will vest in the second grantee a good title as against the first. So we have held that in proceedings against sheriffs for not making money on executions, it is a sufficient defense if he show affirmatively that the property, for not selling which he is sought to be made liable, was, in value, within the limit the statute permits the defendant to claim as exempt. This, when there has been no claim in fact asserted. So, when a debtor has aliened his property without valuable consideration, even though there has been no formal claim of exemption, if the

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property was within the statute, and could have been claimed as exempt, a creditor can not complain of this as fraudulent, for the obvious reason that it simply disposed of property he could not subject, and therefore the conveyance did him no harm.—*McGuire v. Van Pelt*, 55 Ala. 344; *Fellows v. Lewis*, 65 Ala. 343; *Wilson v. Brown*, 58 Ala. 62; *Daniels v. Hamilton*, 52 Ala. 105; *Cook v. Baine*, 37 Ala. 350; *Bell v. Davis*, 42 Ala. 460; Thompson on Homestead, § 646; *Union Bank of Tenn. v. Benham*, 23 Ala. 143; *Steele v. Moody*, 53 Ala. 418. True, if the defendant knowingly permit his property to be seized and sold, without interposing his claim to its exemption, he will be held to have thereby waived his right to claim, and would not be heard afterwards to complain. This rests on the principle that exemption is a privilege which may be waived, and is waived if not properly asserted. There is no incompatibility between this principle, and that stated above.—*Martin v. Lile*, 63 Ala. 406; *Sherry v. Brown*, 66 Ala. 51; *Block v. George*, 70 Ala. 409; *Henderson v. Tucker*, *Id.* 381; *Gresham v. Walker*, 10 Ala. 370; *Bell v. Davis*, 42 Ala. 460.

We have said the levy in this case was irregular, and the sale made was also irregular; and each should have been quashed, if moved for in time. Whether it is now too late to make such motion, we do not determine. Nor do we doubt that if a sheriff refuse to receive a claim of exemption, properly interposed, and to take the necessary steps prescribed by the Code, §§ 2834 *et seq.*, he may be coerced to do so by *mandamus*. What we do decide is, that these were mere irregularities which can not be inquired into, or set aside collaterally. The levy, sale and conveyance divested the legal title, and put it in Clark, the plaintiff. He, therefore, was armed with a title which would support ejectment, and the irregularities mentioned above were no defense to that action, while the sale and conveyance stood. See authorities *supra*.

Lest what is said above may be misconstrued, we will add that the principles here declared are applicable to suits, where there have been a levy, sale and conveyance under execution, not preceded by any valid claim of exemption, filed and acted on. These steps being taken, and not set aside, we hold a purchaser has such legal title as will prevail at law. A different rule may, and probably would prevail, if there had been no levy and sale, and therefore the statutory provisions for interposing and contesting exemption claims can not be made to apply. If the question were raised on the sufficiency of a conveyance to carry the title to a homestead, and suit were brought based on such conveyance, we are not prepared to say the homestead might not then be selected from a larger tract,

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and a defense to the action, *pro tanto*, made good. This question does not arise in this case.

We need not consider the various rulings of the circuit court. None of them did, or could do the appellant any injury; for the defendant had nothing he could urge against the title shown by plaintiff.

Affirmed.

## Holt v. Wilson.

*Bill in Equity to establish Equitable Title to Land, for an Account of Rents, and for Partition.*

1. *Antenuptial contract construed; when express trust in land created by.*—A testator, having devised a tract of land to his widow and grandchild, share and share alike, further provided that, in the event the child died before her marriage or maturity, the whole tract should belong to the widow. After the testator's death, the widow, contemplating a second marriage, entered into an antenuptial contract, whereby it was agreed that, in the event she should become entitled to the child's share in the land, the same should "enure and belong to" the intended husband, and thereafter they should "hold and own the land jointly and equally." After the second marriage was consummated, the child, while an infant of tender years, died. *Held*, that by the contract an express trust was, in effect, declared on the part of the widow, that she would stand seized of the legal title to the use of her intended husband, which became operative upon the death of the child.

2. *What a recognition of the trust as continuing; when not a stale demand.*—The trust having become operative on the death of the child, in May, 1862, and the widow and the husband having held and occupied the lands, as equal tenants in common, from the time of their marriage, in 1861, to the death of the husband, in 1865, *it was further held*, on a bill filed by the heir of the husband, in January, 1883, against parties claiming adversely to him through the widow, for an enforcement of the trust, that the husband having entered under the provisions of the marriage contract, his possession must in equity be referable to it, and the continuance of such possession must be regarded as evidence of a recognition of the trust as existing, continuing, and undischarged; and that the bill having been filed within twenty years from the death of the ancestor, no presumption of a settlement or discharge of the trust can arise from lapse of time, although the trust may have been repudiated immediately after his death.

3. *Same; statute of limitations.*—The bill also alleging that the land was held and occupied by the widow, after the death of complainant's ancestor, until her death, in May, 1873, and negating an open disavowal of the trust by her, brought home to the complainant's knowledge, and any outward and unequivocal act done by her, amounting to an ouster, and also negating every inference of an adverse possession until the year 1877, *it was further held* that complainant's demand was not barred by the statute of limitations of ten years.

4. *Same.*—An adverse possession did not originate in favor of the



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widow, in such case, merely from the fact that, after her second husband's death, she clandestinely and fraudulently destroyed the marriage contract creating the trust in the land.

5. *Deed to husband and wife; how they take under the rule at common law.*—While at common law husband and wife do not take, under a deed to land executed directly to them during coverture, by moieties, as tenants in common take, but by entireties, with the right of survivorship, this rule does not apply to a conveyance executed prior to their marriage; and hence, it has no application to the facts of this case, the marriage contract, creating the rights of the parties, having been executed prior to the marriage, although the actual title of the husband vested afterwards, under the terms of the contract.

6. *Fraudulent concealment of cause of action; § 3242 of Code construed.* The fact that the widow, after the death of the complainant's ancestor, administered on his estate, destroyed the marriage contract, which was not recorded, and the existence of which was unknown to the complainant, and failed to disclose its existence to the complainant while she was acting as administratrix, or to her successor, upon her resignation of the trust, is such a fraudulent concealment of complainant's cause of action as brings the case within the influence of the statute giving a party, seeking relief on the ground of fraud, where the statute has created a bar, one year within which to prosecute his suit after the discovery of the facts constituting the fraud (Code, 1876, § 3242).

7. *Same; discovery of; when complainant not guilty of laches.*—The complainant having been only thirteen years of age when his father died, in 1865, and not residing in his father's family, but in another State, and having received, during the widow's administration, or soon after her resignation, trustworthy information, that his father's estate was insolvent, and that there was no distributive share coming to him, and having been, for the first time, apprised of the existence of the antenuptial contract during a visit to this State a few months before filing his bill, in 1883, it was further held, that these facts sufficiently negative any laches on the part of the complainant, which might otherwise be inferred from his delay in seeking relief.

8. *When bill not multifarious.*—The lands having been sold in separate lots, under a decree of the probate court, as belonging to the widow's estate, by her administrator, to different persons, the several purchasers may be joined as defendants to a bill seeking to enforce the trust.

APPEAL from Montgomery Chancery Court.

Heard before Hon. JOHN A. FOSTER.

This was a bill in equity, exhibited by Waldo P. Wilson against James L. Holt, Reuben W. Sharp, J. C. Gibson and G. H. Gibson, and was filed on 29th January, 1883. Afterwards the bill was amended, and, as amended, the case made thereby may be stated as follows: On or about 1st February, 1860, David Chambliss departed this life, a resident of Montgomery county in this State, seized and possessed of a large and valuable plantation near the city of Montgomery, with other property, and leaving a last will and testament, which was duly admitted to probate on 14th February, 1860, and a copy of which is exhibited with the bill; and also leaving him surviving "his widow, Emeline S. Chambliss, and a granddaughter, Sallie David Chambliss. By the terms of

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said will, the said David Chambliss devised and bequeathed his entire estate, after the payment of his debts, to his said widow and grandchild, to be kept together until the grandchild arrived at age or married, or until the death of his widow; and, on the happening of either of said events, the estate was to be equally divided between said widow and grandchild; but in the event of the death of said grandchild before she married or arrived at the age of twenty-one years, the whole estate should belong to said widow. So that, by the terms of said will, said Emeline S. took an estate in fee in and to an undivided half of the estate of said testator, and an estate in remainder in the other half, contingent on the death of said Sallie David Chambliss before she married or arrived at the age of twenty-one years." On or about 11th November, 1861, the said widow intermarried with Robert S. Wilson, in the said county of Montgomery, and they continued to live together as husband and wife until the death of the said Robert S., in said county, on or about 29th November, 1865. Shortly before their marriage, and in contemplation and consideration thereof, the said Emeline S. Chambliss and Robert S. Wilson entered into an antenuptial contract, in writing, a copy of which is exhibited with the bill. By this contract it was agreed, among other things, "that in the event that the said Emeline S. shall become entitled to the undivided half of said estate of David Chambliss now owned by said Sallie D. Chambliss, the same shall enure and belong to said Robert S. Wilson, and thereafter said Robert S. Wilson and said Emeline S. shall hold and own the estate jointly and equally; and, in consideration thereof, said Robert S. Wilson agrees that, in the event of his death, the said Sallie D. Chambliss surviving him, she shall share in his estate as a full heir at law." The execution of this instrument is not attested by a subscribing witness. In May, 1862, at the age of four years, the said Sallie D. departed this life; and after her death, the said Robert and his wife "held and owned all of the property which had been of the estate of said David Chambliss, as joint property, in which they were equally and jointly interested," including said plantation, which "constituted and was the homestead of said David Chambliss at and before his death; of the said Emeline S. after his death and up to the time of her marriage with Robert S. Wilson; and continued to be the homestead and residence of said Robert S. and Emeline S. Wilson after their marriage, until the death of said Robert S. Wilson; and after his death remained in possession of said Emeline S. until her death as hereinafter stated." Shortly after the death of Robert S. Wilson, said Emeline S. was appointed by the probate court of said county, and duly qualified as administratrix of his estate,

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and, as such administratrix, "she became and was entitled to the possession and control of the papers belonging to his estate, and, amongst other papers, to the original or duplicate original antenuptial contract aforesaid between herself and said Robert S. Wilson." On or about 20th January, 1866, after acting as administratrix only for a short time, she resigned, and soon thereafter made a final settlement with one Waller, who had been appointed administrator *de bonis non*, "and turned over to him certain papers belonging to the estate of said Robert S. Wilson; but did not turn over or deliver to said Waller said original or duplicate original antenuptial contract between herself and said Robert S. Wilson; but, as orator is informed and believes, and so avers, she destroyed the same." It is then averred that she "concealed and withheld from said Waller the said instrument in writing, and destroyed the same, intending thereby to defraud the heirs at law of said Robert S. Wilson." In 1870, said Waller made a final settlement of his administration, and was discharged, and since that time, there has been no administration upon the estate of said Wilson.

In 1868, the said Emeline S. intermarried in said county with one Campbell, and lived with him as his wife until on or about 13th May, 1873, when she departed this life, leaving a last will and testament, which was duly admitted to probate in and by the probate court of said county. Under the decree of said court, and for distribution among the devisees and legatees under the will of the said Emeline S., portions of the lands embraced in said plantation were sold by one Noble, as administrator of the estate of the said Emeline S., on 8th January, 1877; and other portions thereof were sold under the same decree, and for the same purpose, on 3d March, 1879. At both sales the defendant Holt became the purchaser of several portions or lots of said lands, complied with the terms of the sales, went into possession, and ever since has continued in possession, receiving the rents, issues and profits. At the last sale, the defendants J. C. and G. H. Gibson became the purchasers of a part of said lands, and entered into possession of the lands so purchased by them, and continued therein until on or about 4th May, 1879, when they sold and conveyed the same to the defendant Sharp, who has ever since held possession thereof, and received the rents, issues and profits thereof.

Robert S. Wilson had no children born of his marriage with the said Emeline S., but he left him surviving two children by a former marriage, the complainant and a daughter, both of whom, at the death of their father, were infants of tender years, residing in the State of Georgia. Afterwards, and while still a minor, the complainant's sister departed this life, unmarried, intestate, and without debts, leaving him her only heir at



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law and next of kin ; and on her estate no administration has ever been granted. The complainant " continued to reside in the State of Georgia until recently, to-wit, November, 1882, when he came to Alabama, and then, for the first time, heard of the existence of said antenuptial contract, and of its destruction, and until within a short time since, to-wit, within the twelve months last past, your orator had no knowledge or information of the existence of said antenuptial contract." By the amendment to the bill, this averment, among others, is added : " And orator avers that he had no knowledge or information of the existence, concealment or destruction of said antenuptial contract, until after the 29th January, 1882, and less than twelve months before the filing of this bill ; and, in fact, never heard of the same until on or about 1st November, 1882 ;" and that his said sister never had any knowledge or information on the subject, and never heard of the existence of said antenuptial contract. It is also averred that, at the time of the death of the said Robert S. Wilson, complainant was about thirteen years of age, and his sister was about sixteen years of age ; that shortly after the death of the said Robert S., in 1866, a gentleman of high character, residing in the city of Montgomery, a friend of the said Robert S., and whose name is given, wrote to complainant's sister, informing her that the estate of her father was insolvent ; and that they obtained the same information from other sources, and were thus led to believe, and did believe, that they had no interest in his estate worth looking after ; " and, in September, 1882, orator first discovered evidence, and obtained the knowledge of the existence of said antenuptial contract."

It is further averred that " said Emeline S. was lawfully in possession of all of said lands at and upon the death of said Robert S. Wilson, seized in fee to her own use of an undivided one-half thereof, and her subsequent possession of said land up to the time of her death was not adverse to the heirs of said Robert S. Wilson, nor to their equitable rights to an undivided one-half thereof, to which they became entitled by inheritance from their father as aforesaid, upon his death ; and orator is informed, and so avers, that none of said parties who have held possession of said land, or any part thereof, since the death of said Emeline S. have held the same adversely to the heirs of said Robert S. Wilson. On the contrary, orator avers that said Noble, as administrator, undertook to sell, and did sell only the interest of said Emeline S. in said lands ;" that the defendants, before acquiring an interest in said lands, had knowledge or information of the existence of said marriage contract, and of complainant's rights thereunder ; that the knowledge or information of this fact by them and others in attendance on said

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sale, caused the lands to bring about half their actual value; and that said defendants are not *bona fide* purchasers. It is then averred, in the alternative, that Sharp purchased from the Gibsons at a large advance, and that, if complainant is mistaken as to his knowledge or information touching said antenuptial contract, etc., "said J. C. and G. H. Gibson hold the money received by them from said Sharp for said lands, to-wit, \$3,500 in trust for orator, to the extent of one-half thereof, and subject, in all respects, to the rights and equities of orator, to which said lands were subject in their hands as aforesaid."

The prayer of the bill is, that complainant be decreed to be entitled in equity to an undivided half of all of said lands, and of the rents, issues and profits therein, which have been received by said defendants; that an account of such rents, issues and profits be taken, and the amount decreed to be paid to the complainant; that the defendants, Holt and Sharp, be required to let the complainant into the possession of the said lands severally held by them, as tenants in common with them, and they be perpetually enjoined from asserting any title at law against complainant's right to an undivided half of said lands; that said lands be partitioned; and for general relief.

To the bill as amended, the defendants separately demurred on the grounds, in substance, (1) that the bill is multifarious; (2) that the complainant has an adequate remedy at law; (3) that the bill shows that the complainant's demand is stale; and (4) that it is shown by the averments of the bill that said demand is barred by the statute of limitations of ten years. The cause was submitted on the demurrer, and on a motion to dismiss for want of equity; and on the hearing the chancellor caused a decree to be entered, overruling both the demurrer and motion; and that decree is here assigned as error.

SAYRE & GRAVES and RICE & WILEY, for appellants.

TROY & TOMPKINS, *contra*.

SOMERVILLE, J.—It is very clear that, under the state of facts alleged in the bill, and admitted to be true by the demurrer, the interest which R. S. Wilson, the father of complainant, acquired in the lands in controversy before his death, was a purely *equitable* title. These lands were originally the property of David Chambliss, and by his last will and testament, bearing date January 23, 1860, were demised to his widow, Emeline S. Chambliss, and their infant granddaughter, Sallie David Chambliss, share and share alike. It was provided, however, that the share of the grandchild, in the event of her death before marriage or attaining majority, should also belong

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to the widow, a contingency which happened, thus vesting the legal title of the entire property in the widow. It was expressly declared in the articles of marriage settlement, executed antenuptially between Mrs. Chambliss and Wilson, on November 11th, 1861, that upon the happening of this event, the contingent remainder created by the grandchild's death should "*enure and belong to said Robert S. Wilson, and thereafter said Robert S. Wilson and said Emiline S. shall hold and own the estate jointly and equally.*"

This was a clear declaration of trust on the part of Mrs. Chambliss, made while she was *sui juris*, by which she agreed, in effect, to stand seized of the legal title to the use of her intended husband. This was an *express trust*, and became operative upon the death of the grandchild, in May, 1862, it being entirely immaterial that the declaration of trust was made before the legal title was vested in the trustees.—Laws of Real Prop. (Boone) § 161; *Morse v. Morse*, 85 N. Y 53; *Creswell v. Jones*, 68 Ala. 420; 1 Perry on Trusts, §§ 151, 158.

It is insisted that, this trust having been created in May, 1862, and the present bill not having been filed before January, 1883, there arises a presumption of its settlement by reason of the lapse of twenty years from the date of its accrual, upon the well settled doctrine analogous to prescription. The bill, however, alleges facts which must be construed to be a recognition of this trust as a continuing, subsisting and undischarged trust, at least until the twentieth day of January, 1866, when Mrs. Chambliss is shown to have resigned the administration of her husband's estate and repudiated the trust by the destruction of the articles of marriage settlement.—*Garrett v. Garrett*, 69 Ala. 429; *Harrison v. Heplin*, 54 Ala. 552; *McArthur v. Carrie's Admr.* 32 Ala. 75. From the date of the marriage, in 1861, up to the death of the husband, in November, 1865, the averment of the bill is that the husband and wife "held and owned" the property in controversy as "joint property in which they were equally and jointly interested," and that during the entire period it constituted their "homestead and residence." This was a sufficient averment of actual occupancy or possession by the parties, as tenants in common of the property. The husband having entered under the provisions of the marriage contract, his possession must in equity be referable to it, and the continuance of such possession must be regarded as evidence of a recognition of the existing trust as continuing and undischarged. This, as we have said, is a full answer to any argument of presumption based on the lapse of twenty years, this period of time not commencing to run until January 20th, 1866.

Nor are we able to perceive that there is any more merit in  
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the defense of the statute of limitations of ten years. There are two good reasons which, in our opinion, sufficiently justify this conclusion. The statute of limitations, in the first place, does not apply to express trusts, which are peculiarly and exclusively the subjects of equity jurisdiction, like the one under consideration, the possession of the trustee being considered as the possession of the beneficiary, and not becoming adverse until there has been an *open* disavowal of the trust, brought home to the knowledge of the beneficiary with unquestionable certainty.—*McCarthy v. McCarthy*, 74 Ala. 546 ; 2 Brick. Dig. p. 217, § 10 ; Angell on Lim. § 468. It can not be maintained that an adverse possession could originate in favor of Mrs. Wilson alone, by reason of her clandestine and fraudulent destruction of her husband's muniment of title, the marriage contract ; for this would be lacking an essential element of every adverse possession, which is openness and notoriety.

A like rule prevails in the case of cotenants, or tenants in common. Not every exercise of an act of ownership amounts to a disseizin by one as against the other. The possession of one tenant in common is, in general, regarded as the possession of all, and no possession, unaccompanied by some outward and unequivocal act amounting to an ouster, will be construed into an adverse possession. An essential element of such possession is "a *notorious* claim of exclusive right."—Angell on Lim. § 429 ; *Abercrombie v. Baldwin*, 15 Ala. 363 ; Law Real Prop. (Boone) § 359.

The bill negatives every inference of an adverse possession of the land, certainly until the sales made by Noble as administrator of Mrs. Campbell's (formerly Mrs. Wilson's) estate in the year 1877, under which the several defendants are alleged to claim title.

We can not assent to the view urged by appellants' counsel that, under the facts of this case, the relation of tenants in common could not exist between husband and wife, but that they held the land in entirety with right of survivorship. It is true that at common law, where a deed was made directly to husband and wife during coverture, they did not take by moieties, as ordinary tenants in common do, but by entireties with the right of survivorship.—*Baker v. Prewitt*, 64 Ala. 551 ; *Den v. Hardenbergh*, 18 Amer. Dec. 371. The reason of this rule was the legal unity of the husband and wife, a conveyance to both jointly being regarded, in legal contemplation, as a conveyance to but one person.—2 Kent, 132. This rule, however, had no application to a case where a conveyance was made to a man and a woman jointly, and they afterwards married. Having originally taken by moieties, they would continue to so hold after marriage.—4 Kent, 363 ; Coke's Litt. 187 (b). The

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wife, in the present case, owned an undivided half interest in the lands before her marriage with the decedent Wilson, and his right to the other half was created by an antenuptial contract—the same instrument by which a separate equitable estate was created in the wife. The effect of this contract, in our opinion, was to take the case out of the influence of the common law rule, upon the ground that the right of the parties originated before marriage, although the actual title of the husband vested afterwards, pursuant to the terms of the antenuptial agreement.

The same conclusion could possibly be reached in view of the policy of our present legislation, which has not only abolished all right of survivorship between joint tenants, but has abrogated the ancient rules of the common law which made the wife the mere legal shadow of her husband, by recognizing her distinct individuality in the privilege accorded her to hold and own property of all kinds in her own personal right. This principle was held by this court, in *Walthall v. Goree*, 36 Ala. 728, to prevail where the joint deed to husband and wife created a *statutory* separate estate in the wife to the extent of her undivided moiety. Whether an *equitable* separate estate would not come within the same rule we need not decide.—Code, 1876, § 2191; Law Real Prop. (Boone) § 366, notes 12 and 13; Walker's Amer. L. (5th Ed.) 309–310; *Wilson v. Fleming*, 13 Ohio, 68.

The facts of the case, moreover, show a fraudulent concealment of the cause of action, and the aggrieved party had twelve months under the statute, within which to sue after the discovery of the facts constituting the fraud.—*Porter v. Smith*, 65 Ala., 169; Code, 1876, § 3242. Mere silence or passiveness, it is true, does not ordinarily, and in the absence of some trust relationship, constitute such fraud as to excuse the ignorance of the complaining party.—*Underhill v. Mobile, etc., Ins. Co.*, 67 Ala. 45. Nor does fraud, strictly speaking, consist in the destruction of the evidence of a cause of action. But the fact of such destruction is a potent circumstance in proof of a fraudulent concealment of such cause of action, which is the essence of the alleged fraud, on the ground of which relief is sought. When this is coupled with the existence of a fiduciary relation between the parties, rendering disclosure both the moral and legal duty of the trustee, a court of conscience can scarcely preserve its self-respect and at the same time hesitate for one moment to grant relief.—*McCarthy v. McCarthy*, *supra*. The contract of marriage settlement was not recorded, and no one is shown to have had knowledge of its existence except the husband and wife, at least before the time of its destruction by the latter. It is alleged to have been

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executed in duplicate original. When Mrs. Wilson administered on the estate of her husband, it was her duty to disclose to the complainant and other beneficiaries the true status of the estate, and the existence of this marriage settlement, which was the evidence of a valuable property-right belonging to the estate. When she resigned her trust, this paper should have been handed over to her successor in the administration. The refusal on her part to do this, accompanied with the destruction of the document, was the strongest evidence of a fraudulent concealment of the present cause of action. There is full scope for a plain application of the maxim, *Omnia presumuntur contra spoliatorem*.

We think the averments of the bill sufficiently negative any *laches* on the part of the complainant, which might otherwise be inferred by reason of his delay in seeking relief. He was a mere infant of tender years at the time of his father's death, being only about thirteen years of age, and his sister was but a few years older. The two children did not reside in their father's family or household, but in another State. Information, which seems to have been trustworthy, was conveyed to them that the estate was insolvent, and that there was no distributive share coming to them. This information seems to have been obtained either during the period of Mrs. Wilson's administration, or a short time after her resignation, and must have been superinduced by her own fraud in failing to disclose the existence of her husband's interest in the lands owned jointly between them. This naturally deadened the activity of further inquiry on the part of complainant, and removed every implication of a want of proper diligence. Under these circumstances, especially in view of the complainant's *non-residence*, the time and manner of his discovery of the alleged fraud were stated, in our opinion, with sufficient certainty. The date of obtaining the information is stated to have been in November, 1882, and the manner and occasion of its ascertainment, a visit to Alabama, thus affording the first and only opportunity to this end which seems to have been enjoyed. The person from whom the intelligence was acquired is rather a matter of evidence than of allegation under this peculiar state of facts. The averments of the bill acquit the complainant of any negligence imputed by his failure to make an earlier visit to this State, and the information acquired seems to have been a mere accident of the visit.—*James v. James*, 55 Ala. 525; *McCarthy v. McCarthy*, *supra*.

The bill is not subject to the objection of multifariousness on account of the improper misjoinder of parties defendant. It can not be said that any one of those parties is brought in as "a defendant on a record, with a large portion of which, and in



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the case made by which, he *has no connection whatever.*" Story's Eq. Pl. § 530; *Kennedy v. Kennedy*, 2 Ala. 573; *Adams v. Jones*, 68 Ala. 117. "Where the object of the suit is single, it is no objection that the different defendants have separate interests in distinct and independent questions, provided they are all connected with, and arise out of the single object of the suit."—*Randle, Adm'r, v. Boyd*, 73 Ala. 282; *Fellows v. Fellows*, 15 Amer. Dec. 428-29, note; *Larkins v. Biddle*, 21 Ala. 252. The different titles of the several defendants all centre in one subject-matter of suit, and are subject to the same equity, created by the same instrument. Where these facts co-exist, the objection of multifariousness will not hold.—*Kingsbury v. Flowers*, 65 Ala. 479; *County of Dallas v. Timberlake*, 54 Ala. 403; *Johnston v. Smith's Adm'r*, 70 Ala. 108.

The other objections are, in our opinion, without merit, and the motion to dismiss the bill was properly overruled, as were also the several demurrers of the defendants.

Decree affirmed.

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### *Bill in Equity for the Partition of Lands.*

1. *Partition of lands; jurisdiction of court of equity, when title legal and possession adverse.*—A court of equity will take jurisdiction to decree partition of lands, the title to which is strictly legal, and of which the complainant has not possession, actual or constructive, but which are held or claimed adversely to him.

2. *Same.*—When the title is purely legal, the intervention of a court of equity to decree partition of lands is not matter of judicial discretion, but, if the title is admitted, or is clear, is matter of right in the party invoking it; nor is the jurisdiction in such case dependent upon the existence of particular facts or circumstances, rendering inadequate the legal remedy, but is concurrent with that of courts of law; and until the jurisdiction of those courts has been put into exercise, the court will intervene, though no special cause of intervention may be shown.

3. *Same.*—Prior to the statute (Code, 1876, § 3893), if the title was purely legal, the fact that it was disputed did not oust or exclude the jurisdiction of a court of equity to decree partition of lands, but was merely a cause for directing that the issues of fact should be determined in a court of law, and that proceedings should be stayed until they were determined; and under the statute, by its express provisions, such issues may, if the chancellor so directs, be tried as other issues out of chancery.

4. *Same.*—The statute treats a suit in equity for partition, though the title be legal, as essentially an adversary suit, and contemplates that all questions arising in its progress shall be within the jurisdiction of the

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court, and subject to its determination; the mere circumstance of an adverse possession, if the complainant has an immediate right of entry, will not prevent the jurisdiction of the court from attaching; and the fact that such adverse possession appears upon the face of the bill, is not material.

APPEAL from Tuscaloosa Chancery Court.

Tried before Hon. THOMAS COBBS.

The facts are sufficiently stated in the opinion.

VAN HOOSE & POWELL, for appellant.

A. C. HARGROVE, A. B. McEACHIN and J. M. MARTIN, *contra*.

BRICKELL, C. J.—The original bill, filed by the appellant, seeks the partition of lands, and, incidentally, an account of rents and profits. The allegations are, that the father of the complainant died intestate, seized and possessed of the lands, whereby, *eo instanti* his death, they descended to the complainant and his brothers and sisters, as tenants in common. Subsequently, without authority, the mother of the complainant made a sale and conveyance of the lands, purporting to pass the fee simple, and by mesne conveyances they have passed into the possession of the defendant, who holds and claims them adversely; he, and those under whom he claims, having had adverse possession for more than ten years, barring the entry of the brothers and sisters of the complainant, but not barring his right of entry, because of his infancy until a period of less than three years before the filing of the bill. The parties trace title to and from the father of the complainant. A demurrer was taken to the bill, assigning numerous causes, which was sustained by the chancellor. There is presented really but a single question; and that is, whether a court of equity will take jurisdiction to decree partition of lands, the title to which is strictly legal, of which the complainant has not possession, actual or constructive, but which are held and claimed adversely to him.

The jurisdiction of a court of equity to decree partition of lands owned or held jointly, or in common, whether the title is legal or equitable, can not be questioned.—*Deloney v. Walker*, 9 Port. 497; *Horton v. Sledge*, 29 Ala. 478; *Arnett v. Bailey*, 60 Ala. 435. If the title is purely legal, the intervention and aid of the court is not matter of judicial discretion, but, if the title is admitted, or is clear, is matter of right in the party invoking it.—*Deloney v. Walker*, *supra*; *Baring v. Nash*, 1 Ves. & B. 554; *Smith v. Smith*, 10 Paige, 470. Nor is it dependent upon the existence of particular facts or circumstances rendering inadequate the legal remedy. The jurisdic-

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tion of the court, if the title be purely legal, is concurrent with that of courts of law; and until the jurisdiction of those courts has been put in exercise, the court will intervene, though no special cause for intervention may be shown. Practically, in this State, the common-law remedy by writ of partition fell into disuse at an early day, and was superseded by a more summary and simple remedy provided by the territorial statutes, which remained in force until the adoption of the Code of 1852.—Clay's Digest, 386-9. These statutes, with modifications it is not now material to notice, were introduced into the Code, and yet remain, prescribing the only remedy for partition now known to our law, other than that which a court of equity can afford.—Code of 1852, §§ 2677-9; Code of 1876, §§ 3497-3520. It is by the statutes expressly declared, that the remedy prescribed by them is not exclusive, preventing a resort to other legal remedies, and that it does not extend to cases in which an adverse title or claim is asserted.

If, in the progress of a suit in equity for partition, a question involving the equitable title arises, the court of course determines it; for the investigation and determination of equitable titles, their recognition and enforcement, lie peculiarly and exclusively within the province of the court. Freeman on Cotenancy and Partition, § 439; *Cove v. Smith*, 4 Johns. Ch. 276. The title, whether legal or equitable, is, in all suits for partition, drawn in question to some extent, directly or incidentally. If the title, though purely legal, is undisputed, or, if disputed, is clear; or, if the dispute involves no matter of fact, simply a question of law; the practice of the courts in this State has been, not to regard it as an impediment to the exercise of jurisdiction. In *Deloney v. Walker*, *supra*, the parties asserted a purely legal title, descending to them as heirs; and the only point of contention was, as to the construction of the statute of descents. This question the court determined, and decreed partition. In *Horton v. Sledge*, *supra*, the case involved a pure question of law—the construction of the limitations of a legal conveyance, under which the complainant claimed title, which the court determined. There was, however, a disputed fact involved, upon which the title of the complainant depended; the precise time of his birth. The court declined to determine the fact, but suspended or stayed proceedings until, in an action of ejectment at law, the fact was determined. Thus, in effect, this court has declared, that the existence of disputed questions of law, or of disputed facts, upon which a legal title may depend, is not an obstacle or impediment to the exercise of jurisdiction by a court of equity, will not oust or exclude jurisdiction, but is merely a cause for directing that the issues of fact should be determined in a



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court of law, and that proceedings should be stayed until they were determined. If the existence of the disputed questions of law or of fact had been an objection to the jurisdiction of the court, there could not have been any other alternative than the dismissal of the bill. Since these decisions, the statute has declared, that "in all suits for partition of lands or real estate, commenced in any court of chancery in this State, if the defendant by his answer denies the title of the complainant, the chancellor need not dismiss the bill, or delay the suit until a trial can be instituted and had at law; but, in such case, the issue between the parties as to the title of the complainant may, if the chancellor so directs, be tried as other issues out of chancery," etc.—Code of 1876, § 3893. Other issues of fact in chancery are triable by a jury before the chancellor, or sent to a court of law, as in the discretion of the chancellor may be directed. The statute was enacted soon after the decision in *Horton v. Sledge*, *supra*, in which the proper practice was declared to be the suspension of proceedings, until, in an action of ejectment at law, the disputed questions of fact were determined. The purpose of its enactment manifestly was a change of this practice, authorizing a determination of the whole case in the court of chancery. This was its construction soon after its enactment, in *Ormond v. Martin*, 37 Ala. 605, this court saying: "The rule of law which required an action at law to settle a controverted question of legal title, arising in a chancery proceeding for the partition of land, is changed by statute in this State; and it is not now indispensable that such suit should be had."

Whether the fact that, at the institution of a suit in equity for the partition of lands, the defendant has open, notorious, exclusive possession, claiming in hostility to the title of the complainant, not so long continued as to bar the right of entry, precludes the jurisdiction of the court, is a question embarrassed by a conflict of authority. The defendant being in possession under a conveyance from a stranger to the title of the complainant, purporting to pass the entire estate in fee simple, and claiming the lands as his own and for himself exclusively, must be regarded as having disseized the complainant; however clear his title may seem to be, there remains to him only the right of entry which will support ejectment, or the corresponding statutory real action. We are not aware of any authority in England, which declares that the disseizin of a tenant, not so long continued as to bar the right of entry, is an impediment to the exercise of the jurisdiction of the court. All controversies there arising as to the legal title, if not determined by the court, are regarded only as cause for staying proceedings and directing actions at law.—*Parker v. Gerard*,

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Ambler, 236; *Baring v. Nash*, 1 Ves. & B. 566; *Giffard v. Williams*, L. R. 8 Eq. 494; *Munroe v. Walbridge*, 2 Aik. 410. What is the weight of authority prevailing in this country, it is not necessary to discuss. We are inclined to the idea that the better opinion is, that the mere circumstance of an adverse possession, if the complainant has an immediate right of entry, will not prevent the equitable jurisdiction from attaching.—*Hawley v. Soper*, 18 Vermont. 320; *Miller v. Dennett*, 6 N. H. 109; *Marshall v. Crehore*, 13 Metc. 462; *Godfrey v. Godfrey*, 17 Ind. 6; *Howey v. Goings*, 13 Ill. 95; *Overton v. Woolfolk*, 6 Dana, 371; *Obert v. Obert*, 2 Stockton (Ch.), 98; *Little v. Cooper*, *Id.* 273; *Lucas v. King*, *Id.* 277; *Tabler v. Wiseman*, 2 Ohio St. 207. However this may be, it is apparent the statute to which we have referred treats a suit in equity for partition, though the title be legal, as essentially an adversary suit; and contemplates that all questions arising in its progress shall be within the jurisdiction of the court, subject to its determination, avoiding delay in the administration of justice, and a multiplicity of suits with a consequent increase of costs. The court has full power to avail itself of the aid of a jury, and there is no danger that either party will be deprived of the constitutional right to a trial by jury of all litigated questions of fact. The very purpose of the statute is the enlargement of the jurisdiction of the court, rendering the remedy more efficacious and complete. If upon the face of the bill, the fact of the adverse possession of the defendant had not been disclosed—if it had been first made apparent by the answer of the defendant, pleading or averring it in opposition to, or denial of the title of the complainant, there can be no ground for saying that it would have affected the jurisdiction. The statute could not have been obeyed, unless the court had entertained jurisdiction, proceeding to try and determine the fact of adverse possession, calling in, if necessary, the aid of a jury. That the fact appears upon the face of the bill is not material; the jurisdiction of the court is plenary for the determination of its effect. There is much of convenience in the practice the statute prescribes, and it is incapable of injury to any party in interest.

The chancellor was in error, in sustaining the demurrer; and the decree must be reversed, the demurrer overruled, and the cause remanded.

[Pinkard et al. v. Allen's Adm'r et al.]

**Pinkard et al. v. Allen's Adm'r et al.***Distribution of Proceeds of Sale of Railroad among Creditors, made under Decree of Court of Equity foreclosing Mortgage.*

1. *Distribution among creditors of fund realized from sale of debtor's property; when erroneous.*—When a fund realized from the sale of a railroad, made under a decree in equity foreclosing a mortgage executed to secure certain bondholders of the railroad company, being insufficient to pay off the secured bonds in full, was ordered to be distributed *pro rata* among such of the bondholders as had come in and proved their claims, and after some, and before others of such bondholders had received from the register their *pro rata* share of the funds, other bondholders of the same class were allowed to come in by petition, prove their claims, and participate in the undisturbed residuum of the funds,—*held*, that this was manifestly unequal, unjust and erroneous; that the only way by which the petitioning bondholders could be brought in, and enabled to share in the fund would be to recast the whole account and declare a diminished dividend, requiring each creditor who had been settled with, to refund *pro rata* to the register; and that this could not be accomplished by petition.

2. *Same; power of court to vacate interlocutory decree.*—The decree allowing the petitioning bondholders to come in, and participate in the undistributed residuum of the fund was interlocutory, and could be subsequently altered, modified or vacated; and the decree having been made in vacation, without notice to, and without the consent of parties in adverse interest, and being improper in itself, the court, in subsequently vacating it, did not err, but only did what should have been done, with or without motion therefor.

3. *Attorney-at-law; power of court to compel payment of money into court.*—When a practicing attorney receives, as such, money or any thing else of value, by virtue of an order of court, made in a case in which he is counsel, and before he has turned the same over to his client, it is ascertained and decreed that the order has been unadvisedly and erroneously granted, it is in the power of the court to order its restoration to its former custody, and to enforce obedience to such order; and, in such case, the presumed presence of the attorney in court renders it unnecessary to show actual notice prior to the primary order of restoration.

4. *Same.*—If, however, compulsory measures are invoked against the attorney, there should be notice, and an opportunity to show cause should be allowed him.

**APPEAL from Lee Chancery Court.**

Heard before Hon. N. S. GRAHAM.

The facts are sufficiently stated in the opinion.

WATTS & SON, J. M. CHILTON, H. C. LINDSEY, G. W. HOOPER  
and W. P. PINCKARD, for appellants.

BARNES & SON and GEO. F. MOORE, *contra*.



[Pinkard et al. v. Allen's Adm'r et al.]

STONE, J.—No question is raised in this case, as to the regularity of the sale of the Savannah and Memphis railroad, sold under decree of the chancery court. The entire contest is as to the distribution of the proceeds. The transcript before us begins with the decree of the chancellor, ordering a sale of the property, which was rendered March 31st, 1880. That decree shows on its face that there had been a reference to the register, to ascertain and report who were the creditors, and the amount of their several claims. There were two classes of creditors; one having a first, and the other, a second lien. Of the first class he reported certain creditors, the aggregate amount of whose claims was \$204,902. These were to be first paid. No question is raised on this class, for they were paid in full. Three creditors held all the claims falling within this class.

Of the second class, three claims were proved before the register, and he reported in their favor, as follows:

Claim of Palmer, Sibley, Hadden, Young and Tompkins.....	\$ 2,734,888.20;
J. J. Norton.....	3,341.75;
Thomas Allen.....	42,774.40.

The report of the register was confirmed by the chancellor; and, in the decree of sale, among other things, after directing the payment of the expenses and the preferred claims, the chancellor ordered and decreed "that if after making said ordered payments [those to the first lien creditors], there remain still a surplus of proceeds of sale, then the said register shall pay the same out upon the amounts ascertained and found to be due on account of the seven per cent. bonds of said company [the second class] to the parties entitled thereto, or their solicitors of record, ratably and equally, till the said fund is exhausted," etc.

The register made sale of the property, June 7th, 1880, reported the sale on the 8th, and on the 12th the sale was confirmed. The property yielded a considerable surplus above what was required to pay the first lien creditors. The court was in session at each of these dates.

On the 7th day of June, 1880, the court, reciting that certain parties had filed their petitions, praying that they be allowed to file their said bonds and coupons in this court, and that they be allowed to share in the distribution of the proceeds of sale heretofore ordered in said cause, and in all funds that may be therein distributed by this court, on equal terms with, and in like manner as the other holders of the bonds of said company of like kind," proceeded to act on said petitions, and, without a reference to the register, ascertained and decreed

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that there were due from the said railroad company debts of the second class:

To Young, Palmer and Sibley . . . . .	\$ 148,932.05;
“ C. S. Parnell . . . . .	2,866.67;
“ J. J. Lancaster . . . . .	2,366.40;
“ A. N. Lightfoot . . . . .	668.35;
“ E. R. Hampton . . . . .	668.35;
“ Forney Renfro . . . . .	603.85;
“ J. E. Andrews . . . . .	603.85.

The court thereupon “ordered that each of said petitioners should equally, ratably, and in like manner with other like bondholders, participate in the distribution of any fund that may arise for distribution in said cause, as if they had originally proved their claims before the master.” It will be observed that this decretal order was made on the very day on which the sale took place, and, of course, before any money was realized for distribution. The language of this order furnishes additional, strong confirmation of the correctness of our inference, that before the decree of sale, there had been a reference to ascertain and report the debts of the said railroad company of the several classes, and to whom they were due.

Three several petitions were subsequently filed by alleged creditors, praying that they be allowed to come in and prove their claims of the second class, and share with the other creditors in the distribution. The Enterprise Savings Bank of Cairo, Illinois, filed its petition September 30th, 1880; J. C. Maben filed his petition February 11th, 1881; Bonner & Co. filed their petition February 11th, 1881. After the filing of the first of said petitions, the chancellor, at chambers, on the 26th of October, 1880, made the following order, which was received and filed by the register on the next day:

“It is ordered that the register retain in his hands, after paying all preferred claims and costs allowed, as heretofore decreed in this cause, an amount sufficient to pay the claims above mentioned *pro rata* with the like claim or claims of the same class, pending or allowed by the court in this case; and this order to be of force, until the further order and direction of the court in the premises.”

At the March term, 1881, said petitions were submitted to the chancellor, with certain proofs, for decree thereon. He held them up for decree in vacation; and on the 14th June, 1881, he rendered his decree, which was filed by the register on the 17th. This was in vacation. The decree declared that the petitioners be allowed to prove their claims, as creditors of the defendant corporation. It was referred to the register to ascertain and report to the next term of the court “the amount of principal and interest due on the respective claims named

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and referred to in said petitions, after having given the usual notice to the parties interested, of the time and place of doing so." The register executed the reference and made his report June 29th, 1881, in which he reported there was due to J. C. Maben \$4,386; to the Enterprise Savings Bank \$16,082, and to G. T. Bonner & Co. \$3,655. On June 30, 1881, the chancellor, at chambers, acted on said report, and made his decree. In the decree it is recited "that the parties interested in said motion have had notice of this motion, or waive further notice, and consent and agree in writing that there may be a distribution of the funds in the hands of the register," proceeds of the sale of the railroad property. The decree then confirmed the report of the register, and "further ordered and decreed that the said register proceed without delay to distribute the fund remaining in his hands growing out of the sale of the Savannah and Memphis Railroad Company, ratably between said moveants above named and set forth [the petitioning creditors], upon the basis of, and as shown by said report hereby confirmed." On this order, there was paid by the register to the solicitor of J. C. Maben, G. T. Barnes & Co., and Enterprise Savings Bank—the petitioning creditors—the sum of \$1,862.85. We suppose this was done July 1st, 1881, as on that day the solicitor receiving the money entered into a written agreement with a solicitor who represented other adverse interests in the cause, that the money should be held on deposit in bank, until the next term of the court.

On Thursday, the 8th day of September, 1881—the next term of the chancery court, but after the first two days of the term had expired—other creditors of the railroad, whose claims had been regularly proved and allowed, made a motion in court to vacate and set aside the decretal order made at chambers, June 30th, 1881, confirming the register's report and ordering distribution to the petitioning creditors, on the ground, among others, that they had no notice, and had not consented that the report should be acted on in vacation. This motion was not acted on at that term, but was continued until the next term.

On the 7th day of March, 1882, during the next term, Thomas Allen, another creditor of the second class, who had proved his claim before the decree of sale was rendered, and which claim, as we have shown, was expressly provided for in that decree, filed his petition, setting forth that he had no knowledge or notice of any of the proceedings under said petitions, and praying that they be set aside and annulled.

Responding to this petition, as well as the petition of Fanny Renfro and J. E. Andrews, filed at the former term, the chancellor, on the 10th day of March, 1882, decreed that "it appearing to the satisfaction of the court that said decree of



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June 30th, 1881, was rendered in vacation, and without notice to the moveants, and without the consent of the moveants, and it further appearing that said [the solicitor who had received the money], an attorney and solicitor of court, holds the sum of eighteen hundred and sixty-two 85-100 dollars, it is therefore ordered and decreed that said decree made on the 30th June, 1881, as shown by said motion on file in this court, be, and the same is hereby vacated, set aside, and held for naught. It is further ordered, adjudged and decreed that said [the attorney], as such solicitor as aforesaid, pay back into the registry of this court *instantly* the said sum of eighteen hundred and sixty-two 85-100 dollars, collected by him under said decree as aforesaid, and which he holds on deposit in bank, as shown by his agreement on file in this court."

Further explanation is necessary to a full understanding of the questions raised. When the decree of June 7th, 1880, was announced, the residuum of proceeds, after paying the first creditors in full, was sufficient to pay near twenty-seven per cent. on all the claims then proven and allowed. The first report of distribution by the register was made and filed March 7th, 1881. There was then left in the register's hands only \$6,705.16. The dates of the several disbursements set forth in this report are not given. The register was authorized to pay as soon as the sale was confirmed, June 12th, 1880. The order of the chancellor to the register, directing him to retain moneys in his hands, made in consequence of the petition filed by the Enterprise Savings Bank, was made October 26th, 1880. We can not suppose that after that order was made, the register proceeded to pay out the moneys, in utter defiance of that order. If he had done so, we think the petitioning creditors would have brought that fact to the knowledge of the court. In the absence of all showing, or even averment, that the register did pay out after that date, we infer that all the disbursements made by him, shown in his report of March 7th, 1881, were made before October 26th, 1880, leaving in his hands at that time only \$6,705.16. At that time, the following creditors, whose claims had been proven and allowed, had not been paid. Computing their dividends at the same rate the other creditors had been paid—near twenty-seven per cent.—the following sums remained due to them :

Thomas Allen.....	\$5,368.92 ;
J. J. Norton.....	503.84 ;
E. R. Hampton.....	83.89 ;
A. N. Lightfoot.....	83.89 ;
Forney Renfro.....	83.89 ;
J. E. Andrews.....	83.89.

This wanted a fraction of less than five hundred dollars of ex-

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hausting the fund left in the hands of the register. Allowing the petitioning creditors to come in and share in this undistributed residuum of \$6,705, reduced the dividend to each of the remaining unpaid creditors—those stated above included—to a fraction under seventeen per cent. This would give to each of them near forty per cent. less than the other creditors had received. This was manifestly unequal, unjust, and an error. The only way by which the petitioning creditors could have been brought in, and enabled to share in the fund, would have been to re-cast the whole account, and declare a diminished dividend. This, in the then condition of the case, could not be accomplished by petition. It would have required that each creditor of the second class, who had been settled with, should refund to the register *pro rata*. Any thing less than this would have been a distribution of the fund unequally between creditors of one and the same class, and of equal merit.

The record in this case entirely fails to show any notice to, or appearance by Thomas Allen, Forney Renfro and J. E. Andrews, or any consent that any proceedings should be had under the petitions.

It is urged for appellants that the chancellor was without authority to set aside and vacate the order of June 30th, 1881, because no application was made therefor within the first two days of the next succeeding term. Such is the rule when the decree is final.—Rule 80, Chancery Practice; *Ex parte Creswell*, 60 Ala. 378. It is different, however, when the decree is only interlocutory. In general, such decrees or order may be subsequently, even on final hearing, altered, modified, or vacated.—2 Dan. Ch. Pr. (5 Ed.) 1371 and note 1; *McLane v. Spence*, 11 Ala. 172. The decree of June 30th, 1881, was interlocutory. It is manifest that that order was unadvisedly passed, first, because several of the creditors in adverse interest, Thomas Allen among them, had no notice of the pendency of the proceedings; second, because it was granted in vacation, without the consent of several of the parties in adverse interest; and third, because in the then condition of the suit, the order was improper in itself, unless made on full consent. The chancellor, in vacating it, did not err, but did only what he should have done, with or without motion therefor.

The remaining argument urged for a reversal questions the power of the court to order the solicitor to return the money to the registry of the court. If, before proceedings were commenced to vacate the order of June 30th, 1881, the solicitor had paid the money over to his clients, there is no question that he would have stood exonerated. It is not, however, denied, that the money is still under his control. That being the case, it is unnecessary to scrutinize the terms of the agreement

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he made with opposing counsel, as to the custody of the money. He has money in his hands which *ex aquo et bono* belongs to another, and he has no right to retain it. No payment or use he could now make of it, other than a restoration to its rightful custody, would relieve him of liability to account for it, in an appropriate suit. Were he and the money so far within the chancellor's jurisdiction, that he could be rightfully ordered to return the money?

Attorneys and counsellors at law are not officers, in the technical, legal sense. They are not elected or appointed, as public officers are, and they are charged with no public duties. Statutes, civil or criminal, made for the government of officers, do not, without more, embrace them. Still, they are part and parcel of the judicial administration of the laws of the commonwealth. They are instrumentalities—necessary instrumentalities—in all judicial contentions. They receive their authority to represent the interests of others, not as a common or natural right, but in consideration of their ascertained legal learning, and good moral character. They thus become a part of the court's machinery; and, although not technically public officers, they are *quasi* officers. They are called officers of the court; that is, they are instrumentalities, to aid the court in administering the law. So much are they regarded as part of the machinery of the court, that, having business before the court, they are presumed to be present whenever the court is in session. We hold it to be clear, both in reason and authority, that when a practicing attorney receives, as such, moneys, or any thing else of value, in virtue of an order of court made in a cause in which he is counsel, and before he has turned the same over to his client, it is ascertained and decreed that the order had been unadvisedly and erroneously granted, it is in the power of the court to order its restoration to its former custody, and to enforce obedience to such order. And the presumed presence of the attorney in court renders it unnecessary to show actual notice, prior to the primary order of restoration. Of course, if compulsory measures are invoked, there should be notice, and an opportunity to show cause should be allowed the attorney.—*Wilmerdings v. Fowler*, 55 N. Y. 641; 1 Wait's Ac. and Def. 455; *Ex parte Garland*, 4 Wall. 333; *Weeks' Att'y at Law*, pp. 65, 175, 180; *In re Dorsey*, 7 Por. 294, 365, 373, 393.

The decree of the chancellor is affirmed.



[Brady v. Huff.]

**Brady v. Huff.***Statutory Real Action in the Nature of Ejectment.*

1. *Tenants in common ; adverse possession.*—The seizin and possession of a tenant in common constitute the seizin and possession of his co-tenants; and an uninterrupted exclusive possession by him is not usually deemed adverse, unless accompanied by circumstances indicating an expulsion or ouster of his co-tenants.

2. *Cancellation of deed to land ; effect of.*—The mere cancellation of a deed to land, without a reconveyance, does not operate to reinvest the grantor with the legal title.

3. *Tenants in common ; adverse possession.*—A public repudiation by a tenant in common of his co-tenant's title, and a hostile claim of exclusive ownership in himself, operate at once to set in motion the statute of limitations against the co-tenant.

4. *Possession of part of tract of land under color of title ; effect of.* Where one in possession of land holds under color of title, and there is no antagonistic possession, the actual possession of a part of the premises will be regarded as constructive possession of the whole according to the boundaries contained in the deed or other muniment of title.

5. *Forcible entry and detainer ; effect of judgment on prior actual possession.*—An action of forcible entry and detainer is strictly possessory, and can only be sustained by proof of prior *actual* possession, mere *constructive* possession being insufficient to support it; and hence, a judgment in such action in favor of the plaintiff is, as to the fact of prior actual possession, *res adjudicata*, in a statutory real action in the nature of ejectment, brought by the defendant against the plaintiff in the judgment, or against a purchaser from him, for a recovery of the possession of the premises.

APPEAL from Perry Circuit Court.

Tried before Hon. EDMUND W. PETTUS, acting as Special Judge.

The facts are sufficiently stated in the opinion.

WM. M. BROOKS, for appellant.

JNO. F. & E. M. VARY, *contra*.

SOMERVILLE, J.—The action is one in the nature of ejectment, under the statute, for a tract of land containing about four hundred acres, thirty acres of which were arable and enclosed by fence, and the remainder unenclosed woodland. The plaintiff and the defendant each claim title from the same source by conveyances from one William Huntington, the original owner.

The plaintiff, Brady, exhibited the following chain of title:  
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(1) A deed of trust from William Huntington, dated April 4, 1840, conveying the land to one Hodge, *as trustee*, to secure a debt due one Samuel Hildeburn, of Philadelphia. (2) A deed from Hodge, *as trustee*, executed under the power conferred by the trust-deed, dated May 4, 1844, conveying the land to Hildeburn, the beneficiary and creditor. (3) A deed from Mrs. Elizabeth Hildeburn, the executrix of Samuel Hildeburn, to the plaintiff, Brady, dated November 29, 1859, which was introduced in connection with what was claimed to be a probated copy of Hildeburn's last will and testament.

The title of the defendant Huff, on the contrary, was supported by the following evidence: (1) A deed from William Huntington, the original owner, dated November 9, 1838—prior, as will be noticed, in point of time to plaintiff's deed from the same source. This deed purports to be for a valuable consideration, and conveys the land in controversy to Thomas G. Wallace and John Huntington. It was never recorded, but it is shown that very soon after its delivery, Wallace, one of the vendees, went into possession of the lands, under the deed, and cultivated the enclosed portion, through himself and his tenants, until the year 1860. (2) He further exhibited two judgments in his favor for forcible entry and detainer, brought in a justice's court for the possession of the lands, and taken by appeal to the circuit court of Perry county—the one recovered in the year 1863, and the other in 1867. (3) A written endorsement of John Huntington, the co-vendee of Wallace, made upon the original deed from William Huntington, declaring the deed of purchase, as to himself, *rescinded and cancelled*. In this connection it was shown that Wallace had made an open announcement of his adverse claim of exclusive ownership to the lands by *public notice* given at the sale made by Hodge to Hildeburn in May, 1844; and that, being at that time in possession, he remained so until September, 1872, when he sold to the defendant, except for the period of time when he was unlawfully ousted by the forcible entry and detainer of Brady. (4) The defendant, Huff, further introduced a deed from Wallace to himself, dated in September, 1872, under which he continued to hold until the commencement of the present suit in June, 1881.

There was some evidence in the cause which tended to show, perhaps, that the deed of November, 1838, from William Huntington to Wallace and John Huntington was fraudulent as to the then existing creditors of the grantor. Evidence was also offered of some admissions on the part of Wallace, made as late as the year 1858 or 1859, that he was owner of only a part of the land, and not of the whole.

The court charged the jury, at the request of the defendant's

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counsel, that if they believed the evidence they must, under the foregoing state of facts, find for the defendant.

We are of opinion that there was no error in this charge. The action of the plaintiff was barred by lapse of time, and this afforded a complete defense, irrespective of other matters urged in defense, needless to be discussed.

It is true, as insisted by appellant's counsel, that when Wallace went into possession of the lands under the deed of November, 1838, executed by William Huntington to John Huntington and himself, he did so in the capacity of a co-tenant, and his occupancy was presumptively friendly and not adverse to the title of John Huntington. This is upon the familiar principle that the seizin and possession of one tenant in common is the seizin and possession of the other or others, and an uninterrupted exclusive possession by one is not usually deemed adverse, unless accompanied by circumstances indicating an expulsion, or ouster of the other.—Angell on Lim. p. 426, § 419; *Abercrombie v. Baldwin*, 15 Ala. 363.

The facts, however, show very clearly such an unequivocal assertion of hostile and exclusive ownership on the part of Wallace as amounted to an ouster of the only person who could justly claim to be his co-tenant. John Huntington, as we have said, was never personally in actual possession of these lands. He is shown to have rescinded his purchase and abandoned his claim of interest in them as early as 1840, which was four years before Hildeburn purchased from Hodge at the trust sale. It is obvious that the mere cancellation of the deed, without a reconveyance, did not operate to reinvest William Huntington with the legal title to the lands. The most it could do was to give him a mere equity to the undivided half interest of John Huntington.—*Smith v. Cockrell*, 66 Ala. 64. It is claimed that this half interest, at least, passed to Hildeburn by purchase at the sale made by Hodge in 1844. Let us concede this to be true. The claim of title made by Wallace at this sale was unequivocally adverse in its character, and was brought home to the knowledge of the purchaser. It was a public repudiation of the alleged co-tenant's title, by a hostile claim of exclusive ownership in himself. It operated at once to set in motion the running of the statute of limitations against Hildeburn, who, having purchased at the sale, was chargeable with notice of the adverse claim. The statute began to run against Hildeburn, therefore, in whatever capacity he claimed, whether as co-tenant, claiming an undivided half interest, or as purchaser claiming the whole.

This adverse possession of Wallace, thus inaugurated in the year 1844, is shown to have continued uninterrupted until the



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year 1860, a period of about sixteen years. There is no proof that during this time the continuity of his possession was broken, or the exclusive character of his claim repudiated, except by a casual admission verbally made as late as the year 1859—long after the bar of the statute must be presumed to have been complete.

It is not denied that, in ordinary cases, where one in possession of lands holds under color of title, and there is no antagonistic possession, the actual possession of *a part* of the premises will be regarded constructively as a possession of the whole, to the extent of the boundaries described in the deed, or other written muniment of title. Such is unquestionably the established rule.—*Farley v. Smith*, 39 Ala. 38; Trial of Titles to Land (Sedg. & Wait), §§ 763, 769. Under its influence, unless there be some principle making the present case an exception, the actual possession of the thirty acres of enclosed land by Wallace, under the deed from William Huntington, would be constructively extended so as to include the whole tract, commensurate with its described boundaries.

But it is insisted that *good faith* is a necessary ingredient in *constructive* possession, although it may not be requisite in actual possession, and, therefore, as the deed under which Wallace claimed may have been fraudulent, the element of *bona fides* was wanting, and for this reason his possession should be confined to a *possessio pedis*, limited to the thirty acres of enclosed land, and could not be extended further by construction.—Trial of Title to Land (Sedg. & W.), § 775, and cases cited. Admitting this view of the law to be correct, it can avail the plaintiff nothing in this action, because the whole question of Wallace's possession was settled adversely to the plaintiff in the two actions of forcible entry and detainer brought by him against Brady, the plaintiff, in the years 1863 and 1867. Actions of this class are strictly possessory and can be sustained only by proof of prior *actual* possession; mere constructive possession being insufficient to support them. *Houston v. Farris*, 71 Ala. 570; 2 Brick. Dig. § 35. The fact of Wallace's actual possession of the entire tract of land in controversy, must be regarded as *res adjudicata* as to Brady. It was a point necessarily involved, and one which must have been actually decided in these possessory actions, as a finding upon it was necessary to uphold the two judgments, which were adverse to Brady and in favor of Wallace.—*Norwood v. Kirby*, 70 Ala. 397; *McCalley v. Robinson*, 70 Ala. 432; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; Trial of Title to Land (Sedgw. & W.), § 94.

And it is manifest that the estoppel created by these judgments, and the finding of facts on which they are based, will

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operate in favor of the defendant, Huff, as effectually as for Wallace, because there is an immediate privity of title or estate between them. It is well settled that *privies*, whether in estate, blood, or by operation of law, are as fully concluded by judgments as *parties* are.—*Crow v. Hudson*, 21 Ala. 560; *McLelland v. Ridgeway*, 12 Ala. 482.

This view of the case is sufficient to justify the charge of the court without more. The plaintiff's right of action was barred by the statute of limitations of ten years, prior to any declarations by defendant tending to relinquish or modify the hostile character of his previous adverse possession.

We could probably reach the same conclusion by a different process of reasoning. The entry of Brady upon the lands, under his deed of purchase from Mr. Hildeburn, bearing date in November, 1859, would not, we are strongly inclined to think, interrupt the continuity of Wallace's adverse possession. The possession thus acquired was wrongful in its incipiency, and was so adjudged to be in the actions of forcible entry and detainer. The intruder was adjudged to be a trespasser, and, in as much as these actions were instituted within the period of time authorized by the statute, and were prosecuted to a successful termination, it would seem that the wrongdoer ought not to be permitted to invoke his wrongful act, done in violation of law, to stop the running of the statute of limitations. *Turnley v. Hanna*, 67 Ala. 101. The interruptions of a trespasser will not generally break the continuity of an adverse possession, if promptly and effectually litigated.—*Ladd v. Dubroca*, 61 Ala. 25; *Bell v. Denson*, 56 Ala. 444; *Farmer v. Eslava*, 11 Ala. 1028; Angell on Lim. § 413, p. 418, note 2. The statute allows three years within which such rights may be redressed, and delay occasioned by procrastinating continuances can avail nothing, if the plaintiff is ultimately successful in his action.—Code, 1876, § 3705. It is unnecessary, however, for us to decide this point, and we refrain from doing so. It is obvious that, under the influences of the principle, making due allowance for the suspension of the statute of limitations during the period of the war between the States, extending from 1861 to 1865, the bar of the statute would be complete by virtue of Wallace's and Huff's adverse possession extending from 1860 to the year 1881, when the present action was commenced. We rest our decision, however, upon the first point, and are satisfied that the charge of the court, and the consequent finding of the jury were free from error.

The judgment is accordingly affirmed.

[Mathews v. Mobile Mutual Insurance Company.]

## Mathews v. Mobile Mutual Insurance Company.

*Bill in Equity by Creditor to have Conveyance of Land set aside as Fraudulent.*

1. *Writs of fieri facias from probate court; lien of equal to that of those issued by other courts.*—The lien of writs of *fiери facias* issued from the probate court is equal to, and not different from that of those issued by common-law courts.

2. *Lien of execution; extent of.*—The lien of an execution operates upon and binds, not only the property subject to its mandate, which is in the possession of the defendant, or the title to which stands in his name, but also property, with the title to which he has parted for the purpose of hindering, delaying and defrauding his creditors, unless it has been conveyed by the grantee having possession to a *bona fide* purchaser for a valuable consideration, and without notice.

3. *Same; when not lost.*—The lien of an execution, so long as it is kept alive, can not be defeated or impaired by the activity of creditors acquiring a junior lien; nor is it lost by mere passiveness, by mere neglect to force a levy and sale; but there must be culpable *laches* or fraud on the part of the creditor to work its loss.

4. *Fraudulent conveyances; intervention of court of equity in aid of creditors.*—At common law, independent of statute, a court of equity would intervene in aid of a creditor who had obtained judgment and execution at law, to remove fraudulent transfers or conveyances of property upon which the judgment or execution operated a lien; and also, on a return of execution "no property found," to reach and subject assets not subject to execution at law.

5. *Same; effect of filing of bill on priority of liens.*—Where the purpose of the suit is to reach equitable assets, the filing of the bill, being in the nature of an equitable levy, creates a lien on the assets sought to be subjected, which is prior to, and prevails against the demands of creditors subsequently coming in, though they are senior judgment creditors, and, at law, may have a priority of right to satisfaction from legal assets; but where the aid of the court is sought to subject property on which there is an execution lien, the filing of the bill, not being the creation of a new or other lien, but, like a levy, merely individualizing and rendering the general lien of the execution specific as to the particular property sought to be subjected, does not disturb the priority of liens theretofore existing on the property.

6. *Same; filing bill does not displace lien of judgment creditor under execution.*—A simple contract creditor, proceeding under the statute in a court of equity to have vacated and set aside fraudulent conveyances or transfers of property subject to execution at law, does not thereby acquire a preference over a judgment creditor who has a prior lien under an execution duly issued, and in the hands of the sheriff at the time of the filing of the bill.

7. *Court of equity, dealing with legal rights, follows rules of law.*—A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances,



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the court is as much bound by it as would be a court of law, if the controversy was there pending.

APPEAL from Wilcox Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity, exhibited, on 7th February, 1880, by the Mobile Mutual Insurance Company, a body corporate, and a simple contract creditor of William T. Mathews, sr., against the said Mathews and others, for the purpose of having vacated and set aside, as fraudulent and void, a conveyance of land, executed by the said Mathews to his son, William T. Mathews, jr., in trust for the grantor's wife, on 10th December, 1875, and other conveyances of the same land, subsequently executed; and of subjecting the land conveyed to the payment of complainant's demand. To the bill as amended Josiah Robbins, individually and as guardian of Jesse S. and Osborne D. Steele, and R. H. Dawson, as guardian of David A. Steele, were made parties defendant, as "claiming or pretending to have liens in favor of their respective wards" upon said land. It is averred, on information and belief, "that the said Robbins and Dawson say that, in 1876, decrees were rendered by the probate court of Wilcox county against the said Mathews, sr., on the final settlement of his guardianship of the said Jesse S., Osborne D. and David A. Steele, in favor of the said Dawson and Robbins as their respective guardians; and which decrees remaining unsatisfied, they allege that executions were thereupon regularly issued from December 7th, 1876, until the present time, without the lapse of an entire term; and that said executions were returned by the sheriff of Wilcox county 'no property found.' Said Robbins further claims to be the owner of the decree in favor of the said Dawson, as guardian of the said David A. Steele, a minor, alleging that he has paid up the same to said Dawson, as guardian, and received from him a transfer and assignment thereof, but controlling the same in the name of the said Dawson." It is denied that either the said Robbins or Dawson has "any such lien as is claimed by them, growing out of said decrees and the proceedings had thereon." It is also averred that "whatever interest or claim or lien the said judgment creditors may have acquired by reason of the proceedings hereinbefore set forth, such interest, claim or lien is subordinate to that which has accrued to your orators by the filing of this bill, and the service of process thereunder, before any action was taken by the said Robbins and Dawson upon their said executions, other than causing them to be issued and returned unsatisfied; that, as they are advised, said Robbins and Dawson should have gone further, and exhausted their legal remedies and filed a bill before

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your orator ; and that not having done so, their claims must be postponed to that of your orator, who, by superior diligence, has become entitled to a priority of lien over said Robbins and Dawson upon the land in controversy, and a priority of satisfaction out of the same."

The defendant Robbins answered, admitting and averring that the deeds sought to be set aside were fraudulent as stated in the bill, and as against him, and further averring that the said William T. Mathews, sr., who had been appointed, and for years acted as the guardian of David A., Osborne D. and Jesse S. Steele, resigned as such guardian, and, in December, 1876, made a final settlement of his guardianships of said minors in the probate court of Wilcox county ; that on said settlement, R. H. Dawson, as the guardian of the said David A. Steele, appointed as the successor of the said Mathews, and the said Robbins, as the guardian of the said Osborne D. and Jesse S. Steele, appointed as the successor of said Mathews, obtained decrees against the said Mathews for large sums of money due to said minors ; that the said Robbins, being a surety on the bond of the said Mathews, and the only solvent surety, and finding that the said Mathews would not pay said decree, and that execution would be sued out against him, obtained from the said Dawson a transfer of the decree in the latter's favor as guardian of David A. Steele, and said decree was the property of the said Robbins ; that on 13th December, 1876, executions were duly issued on said decrees and were continued to be issued thereafter up to and after the filing of the bill in this cause, all of which, except one issued in May, 1880, and in the hands of the sheriff at the time said answer was filed, were returned "no property found;" and that at the time of the filing of the bill, executions issued on said decrees were in the hands of the sheriff. It is prayed that the answer be taken and considered as a cross-bill ; that said conveyances be declared fraudulent and void, and the land conveyed be sold, and the proceeds applied first to the payment of said decrees. The evidence introduced in the cause tended to support the averments of the answer.

On the hearing, had on pleadings and proof, the chancellor caused a decree to be entered, declaring the said conveyances fraudulent and void, and vacating them, ordering a sale of the land, and from its proceeds, decreeing satisfaction of complainant's demand in priority of the said decrees of the said probate court in favor of the defendant Robbins.

This appeal is prosecuted by said Robbins, in the name of all the defendants ; and it is made the basis of the errors here assigned.

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S. J. CUMMING, for appellant.

R. H. DAWSON and JNO. P. TILLMAN, *contra*.

BRICKELL, C. J.—The court of probate has power, equivalent to that of courts of law, to enforce satisfaction of its decrees for the payment of money, by the ordinary writ of *fiery facias*, or execution.—Code of 1876, § 711. All writs of *fiery facias*, issuing from a court of record, are a lien on the lands and personal property of the defendant, subject to levy and sale, within the county of the sheriff to whom it is delivered for execution; the lien commencing from the day of delivery, and continuing as long as there is a continuation of the writ, and of its delivery to the sheriff, without the lapse of an entire term.—Code of 1876, § 3210. As to the lien, there has been no distinction, and there is no room for a distinction, between writs of *fiery facias* issued from the court of probate, and such writs issued from courts of law—they stand upon an equality.

The lien of an execution, by which is intended a *fiery facias*, is operative upon, and binds all property, real or personal, which is the subject of levy and sale in obedience to its mandate; and, of consequence, it is sometimes termed a general lien, to distinguish it from liens which operate only on specific or particular property. And the lien operates and binds, not only the property subject to its mandate, which is in the possession of the defendant, or the title to which stands in his name; but it operates equally on all such property, with the title to which he has parted for the purpose of hindering, delaying, and defrauding his creditors, until there is the coming in of a *bona fide* purchaser, without notice, and for a valuable consideration, from the fraudulent grantee or donee having possession. The conveyance or transfer of the property, though it may be valid between the parties, is invalid—it is void—as to creditors. And creditors may disregard it entirely, and proceed to levy and sell the property under legal process; or they may proceed, in a court of equity, to remove the conveyance or transfer as an obstacle to the advantageous enforcement of their legal rights. Whichever is the remedy they elect to pursue, it is but a remedy for the enforcement of the lien of the *fiery facias*.—Freeman on Executions, §§ 136, 430; *Carter v. Castleberry*, 5 Ala. 277; *Dargan v. Waring*, 11 Ala. 988. The lien, so long as the creditor keeps it alive by the regular issue and delivery of executions to the sheriff, can not be defeated or impaired by the activity of creditors acquiring a junior lien; nor is it lost by mere passiveness—by mere neglect to force a levy and sale; there must be culpable *laches*,  
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or fraud upon the part of the creditor, to work its loss. *Wood v. Gary*, 5 Ala. 43; *Johnson v. Williams*, 8 Ala. 529; *Turner v. Lawrence*, 11 Ala. 426; *De Vendell v. Hamilton*, 27 Ala. 156.

These well settled principles leave no room for doubt, that the executions issuing from the court of probate, which were in the hands of the sheriff when the bill was filed by the insurance company, for the subjection of lands, the legal title to which had resided in the defendant in execution, and which he had conveyed fraudulently, were a lien, operative and binding upon the lands, and, by reason of its seniority, entitled to prevail over all conventional liens, and all liens acquired by legal or equitable process, which were junior in point of time.

In the absence of statutes enlarging its jurisdiction, a court of equity did not intervene for the assistance of creditors who had not reduced their demands to judgments at law. Until the creditor had obtained judgment at law, the justness of his demand, and his right and relation as a creditor, were not established; and to compel payment of a mere legal debt, the court would not interfere.—*Lehman v. Meyer*, 67 Ala. 396. But the creditor having obtained judgment and execution at law, the court assisted him, first, to remove fraudulent transfers or conveyances of property, upon which the judgment or execution operated a lien. The court, in this case, simply rendered aid in carrying into effect the judgment and execution at law. The lien of the creditor was acquired at law, and not through the instrumentality of the court of equity.—*Dargan v. Waring*, 11 Ala. 988; *Evans v. Welch*, 63 Ala. 250. And the court intervenes without awaiting the return of execution—it intervenes because the creditor had a lien.—*Lehman v. Meyer*, *supra*; *Evans v. Welch*, *supra*. Until the filing of the bill, the issue and service of process, the lien of the execution is general, binding and operative upon all property subject to levy and sale; to which all subsequent alienations made by the judgment debtor, and all subsequent liens arising by operation of law, are subordinate, so long as the execution is kept alive. The filing of the bill is not the creation of a new or other lien; like a levy, it simply individualizes and renders the general lien specific as to the particular property, separating that property, in this respect, from other property covered by the general lien. The court also assisted judgment creditors, who, by a return of execution “no property found,” showed that legal remedies had been exhausted, to reach assets not subject to execution at law. The assets not being subject to execution at law, a lien upon them could not be acquired otherwise than through the aid of a court of equity. The filing of

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the bill, and the due issue and service of process, created a lien upon such assets as the bill sought to reach; it was said to be in the nature of an "equitable levy."—*Miller v. Sherry*, 2 Wall. 237; *Tilford v. Burnham*, 7 Dana, 109; *Beck v. Burdett*, 1 Paige, 305; *Corning v. White*, 2 *Ib.* 567; *Storm v. Waddell*, 2 Sandf. Ch. 494. The creditor first filing bill, and obtaining service of process, acquired the prior lien, which would prevail against creditors subsequently coming in, though they were senior judgment creditors, and, at law, may have had a priority of right to satisfaction from legal assets.—*Boynton v. Rawson*, 1 Clarke Ch. 410; *Lucas v. Atwood*, 2 Stew. 378; *Eaton v. Patterson*, 2 St. & Port. 9. But a junior judgment creditor, proceeding in a court of equity for the removal of fraudulent conveyances or transfers of property, subject to execution at law, did not acquire a preference over senior judgment creditors who had the prior lien at law.—*Dargan v. Waring*, *supra*; *Scouton v. Bender*, 3 How. Pr. 185; Bump on Fraud. Con. 535. A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances, the court is as much bound by it as would be a court of law, if the controversy was there pending.—1 Story Eq. § 64. The court comes as an auxiliary, to give effect to, and render more available legal liens, not to displace them, nor to subvert the order of priority which the law has established. The senior judgment creditor may have lost his priority, and will lose it by the neglect to sue out execution from term to term; and if it is lost by such neglect, the junior creditor who is more diligent, and has resorted to equity, will be preferred. But, until the priority given by law is lost by *laches*, it will be protected and preserved. All liens acquired by operation of legal or equitable process, are in subordination to prior liens or equities, unless protection against them is afforded by the statutes of registration. The lien operates upon, and binds only the right, or title, or interest, or estate of the debtor; they are incapable of creating any higher right, title, interest, or estate.—*Smith v. Perry*, 56 Ala. 266.

The statute (Code of 1876, § 3886), authorizes a creditor not having a lien, a creditor at large, to proceed in equity to subject property which the debtor has fraudulently conveyed, or attempted to convey fraudulently. It was under this statute, that the insurance company, a simple contract creditor, filed the bill to reach and subject the land which Mathews had conveyed in fraud of his creditors. Whether a simple contract creditor, proceeding under the statute, acquires a lien upon the property which the debtor has conveyed, or attempted to con-

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vey fraudulently, or whether the bill operates as a *lis pendens*, affecting and binding all parties acquiring rights and interests in the property subsequently, is not, probably, of practical importance. In either event, it is in subordination, not in destruction of prior liens and equities which are *bona fide*. It is rights, or interests, or equities which are acquired subsequently, that must yield to the lien or *lis pendens*. The creditor at large, resorting to a court of equity under the statute, has the rights of a judgment creditor, so far as a judgment was deemed essential to the jurisdiction of the court. But he has no higher rights, and when the lien or right of a judgment creditor would yield to senior rights or equities, the rights of the creditor at large derived from the statute must also yield. We can discover no reason for displacing the prior lien of the execution issuing from the court of probate. If the controversy were in a court of law, which was proceeding to direct the sheriff in the distribution of the proceeds of the sale of the lands, they would be entitled to priority of payment; and it is the duty of the court of equity, in this respect, to follow the law.

The result is, the chancellor erred in not decreeing satisfaction of the execution in priority of the decree in favor of the insurance company; and for the error the decree must be reversed and the cause remanded.

## Crabtree v. Baker.

### *Bill in Equity for Injunction and Abatement of Nuisance.*

1. *Rights of proprietors of superior and inferior heritages as to flow of surface water.*—While the owner of higher lands has a servitude or natural easement upon the lower adjoining land for the discharge of all surface water flowing naturally from the former on the latter, and the natural passage of such water can not be prevented or obstructed by the owner of the lower, to the injury of the higher land, this servitude or easement extends only to surface water rising from natural causes, as by rain, and does not authorize the proprietor of the higher land, by the collection of water into drains or artificial channels, to precipitate it in increased quantity and volume upon, and to the detriment of the lower land.

2. *Proprietor of inferior heritage; right to stop flow of surface water.* If the owner of the higher land, by drains or channels artificially constructed, collects the surface water thereon and discharges it, in undue and unnatural quantities, upon the lower lands, this would be an open invasion of the rights of the owner of the latter, which, if suffered to continue without a resort to legal remedies for the period prescribed by the statute of limitations for the recovery of lands, would become evidence of an adverse right; and against this invasion he can protect himself by



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placing obstructions in the drain or channel, if thereby he does not inflict injury upon innocent strangers; the rule being that where a party can maintain an action for a nuisance, he may enter and abate it.

3. *Same; may defend against injunction to remove obstructions, without proof of actual damage.*—In such case, the owner of the lower lands may defend against a bill inequity filed by the owner of the higher lands, to enjoin the continuance of the obstructions, without proof of actual damage suffered by him from the water discharged through the artificial drains or channels.

4. *Injury resulting from wrongful act; when wrongdoer can not complain.*—In such case, the complainant can not be heard to complain because the obstructions have increased the quantity of water which would flow or stand upon adjacent roads used by the public, although causing peculiar injury to him, he being the original wrongdoer, and the injury having resulted from his own wrongful act in flooding the defendant's lands.

5. *Motion to dissolve injunction by party in contempt; when entertained.*—A party in contempt for a real, substantial, not a mere technical disobedience of an injunction, a disobedience calling for punishment, will not be heard on a motion for its dissolution until the contempt is purged; but the motion may be entertained where the nature and extent of the punishment to be imposed for the contempt depend on the determination of the question, whether the injunction shall be continued or dissolved, and involves essentially the inquiry, whether it was not, in the first instance, improvidently granted.

#### APPEAL from Mobile Chancery Court.

Heard before Hon. JNO. A. FOSTER.

This was a bill in equity, exhibited by A. P. Baker and Martin Costello against Lewis Crabtree, and filed on 16th February, 1884. Its purpose and its material averments, as well as the facts disclosed by the record, necessary to this report, are stated in the opinion.

On filing the bill, an injunction was granted, enjoining the defendant from damming a certain ditch described in the bill, "or in any wise obstructing the flow of water therethrough, and not only from creating, but from permitting any dam or obstruction of said ditch, and the free flow of water through the same until the further orders of this court." On 29th February, 1884, on the petition of the complainant, a rule *nisi* was issued, as directed by the chancellor, and was, on the same day, served on the defendant, citing him to appear before the chancellor at a designated place and time, and to show cause why he should not be attached for contempt in violating the injunction. The defendant answered the rule, averring, among other things, that since the service of the writ upon him, he had done nothing in the premises, had not removed the dam erected on his land prior to the filing of the bill, and that he was advised by counsel that he was not required to remove said dam. The cause was heard before the chancellor in vacation, on (1) a motion made by the defendant to dissolve the injunction on the denials in his answer, and for want of

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equity in the bill, and (2) on the complainants' motion to make the rule *nisi* absolute, and for an attachment; and on 22nd March, 1884, the chancellor filed an opinion and decree on these motions. Being of the opinion that the defendant had theretofore "disregarded the injunction from what seems a misapprehension of his duty," the chancellor declined "to take action against him for his failure to obey the injunction;" but he overruled the motion to dissolve, and ordered the defendant to remove the dam within five days after the filing of the decree, providing for his imprisonment in the event he failed to obey.

The overruling of the motion to dissolve is here assigned as error.

L. H. FAITH and C. H. LINDSEY, for appellant.

TOULMIN, TAYLOR & PRINCE and H. PILLANS, *contra*.

BRICKELL, C. J.—It is well settled by a uniform course of decisions, English and American, that the proprietors of lands, over or through which "a stream of water usually flows in a definite channel, having a bed, sides or banks, and usually discharging itself into some other stream or body of water," have a clear legal right, not derived from, or dependent upon prescription or long continued use, but a right as matter of law and as an incident of the ownership of the land, to the use of the water flowing in the stream, as it is accustomed to flow, without detrimental diminution or alteration.—3 Kent, 439; *Hendricks v. Johnson*, 6 Port. 472; *Stein v. Burden*, 24 Ala. 130; *Stein v. Ashby*, *Ib.* 521; *Burden v. Stein*, 27 Ala. 104; *Stein v. Burden*, 29 Ala. 127. The present case, it must be observed, does not draw into consideration the relative rights and duties of such proprietors, and depends upon principles, which, though they may bear some similarity, are not in all respects identical with the principles which prevail in reference to water-courses. The water now in question naturally originates from the fall of rain upon the lands of the complainants, spreading itself over the surface, collecting, because of depressions in the lands, into ponds, which stand until absorbed or evaporated. The water, so far as it flows off naturally, flows upon the lower lands of the defendant. There is much diversity of opinion in judicial decision, and among the text writers, as to the principles which should govern in reference to such water, termed surface water, in distinction from the water of a stream, and from subterranean or hidden water. The principle this court has adopted, borrowed from the civil law, is, that the owner of higher land has a servitude or natural easement upon the lower

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adjoining land for the discharge of all surface water flowing naturally thereon from the higher land, and the owner of the lower land can not prevent or obstruct the natural passage of such water to the injury of the higher land.—*Hughes v. Anderson*, 68 Ala. 280; *Ninninger v. Norwood*, 72 Ala. 277; following in this respect the cases of *Kauffman v. Griesemer*, 26 Penn. St. 407, and *Martin v. Riddle*, *Ib.* 415, which were reaffirmed in *Hays v. Hinkleman*, 68 Penn. St. 324. The weight of authority, perhaps, is in accordance with this doctrine, with an exception as to city or village lots and their improvement for building. But the servitude or easement extends only to surface water arising from natural causes, as by the falling of rains and melting of snow; and it does not authorize the proprietor of the higher land, by the collection of water into drains or artificial channels, to precipitate it in increased quantity and volume upon, and to the detriment of the lower land.—*Hughes v. Anderson*, *supra*; *Kauffman v. Griesemer*, *supra*; *Butler Peck*, 16 Ohio St. 334; *Livingston v. McDonald*, 21 Iowa, 160; *Adams v. Walker*, 34 Conn. 466; *Hicks v. Silliman*, 93 Ill. 255; *Miller v. Laubach*, 47 Penn. St. 154. In the case last cited, the court said: “No doubt the owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation reasonably used as the stream may give him. But that is an entirely different thing from draining the water standing on the lands of one, through artificial channels, on to that of another. That can not be done without his consent.” In *Butler v. Peck*, *supra*, in considering the right of the owner of the higher land, by the construction of artificial drains, to throw surface water, or the water originating upon his land, upon the lower lands of an adjacent proprietor, the court said: “We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and these altitudes may not be artificially changed to the damage of an adjacent proprietor.” The burden resting upon the lower land is to receive from the higher land the water which flows therefrom naturally without the art of man; the water which comes to it because of its natural depression. There is no right in the owner of the higher land, by artificial constructions designed for its improvement, relieving it from its natural disadvantages, to increase the burdens of the lower estate.—*Hurdman v. N. E. Railway Co.*, 3 L. R. (C. P. Div.) 168; Gould on Waters,



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§ 267; Angell on Watercourses, § 108; Cooley on Torts, 579-80. And if he collects surface water into an artificial channel, casting it in a body upon the lower land, it is an actionable tort, and may be an injury a court of equity would prevent by injunction.—*Hughes v. Anderson, supra*; *Ninninger v. Norwood, supra*.

The facts of this case, as shown by the bill and answer, and the affidavits which were submitted upon a motion for a dissolution of the injunction, are, that four or five years ago the complainants became the owners of two several and adjoining parcels of land, lying some four or five feet higher than the land the defendant has since acquired. These lands are all agricultural, and are used for the purposes of agriculture. The lands of the complainants, naturally, in time of heavy rains, were subject to be overflowed by the falling water, which would collect in the depressions thereon, forming standing ponds until it was absorbed or evaporated, rendering parts thereof unfit for cultivation. The complainants have constructed ditches for their drainage which lead into a larger ditch running upon the lands of the defendant and there terminating, by which all the water falling upon the lands of the complainants, and which had been accustomed to form into ponds, is cast upon the lands of the defendant, spreads upon the surface thereof, and inflicts upon him an injury of the same kind, and probably as great in degree, as that from which the complainants relieved their land. For the prevention of the injury the defendant has constructed, at or about the point the ditch enters his lands, an embankment or dam, by which the water is thrown back, and it flows again on the lands of the complainants; and it is the continuance of this dam against which the injunction is directed. Whether there is actual damage to the lands of the defendant, and if there be, its extent, is a matter about which the witnesses differ in opinion. The fact, however, is not controverted, and it is apparent from the breadth, depth, and length of the ditch, from the conformation of the lands through which it runs, and from the fact so prominently pressed in the bill, that it has effectually drained the lands of the complainants, that thereby the water is collected and discharged in undue and unnatural quantities upon the lands of the defendant; and when it is not made to appear that the drainage of the lower land is sufficient to carry it off, there would seem to be little difficulty in reaching the conclusion, that actual, permanent injury results. But there is, in any event, estimable injury, and proof of actual damage is not necessary. There is an open invasion of the rights of the defendant, and if suffered to continue, without a resort to legal remedies, for the period prescribed by the statute of limitations

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for the recovery of lands, would become evidence of an adverse right. Where the act done is of that character that its repetition or continuance ripens into evidence of a right to do it, the act is actionable in itself, if wrongful, and the law gives nominal damages, though no actual damage has resulted. *Stein v. Burden*, 24 Ala. 130; *Polly v. McCall*, 37 Ala. 20; *Wood on Nuisances*, § 102.

It will not be denied that the defendant had the right to protect himself against this invasion of his lands—that he could lawfully place obstructions in the ditch which avert the injury, if thereby he did not inflict injury upon innocent strangers. *Martin v. Riddle*, 26 Penn. St. 415. The general rule is, that where a party can maintain an action for a nuisance, he may enter and abate it.—*Wood on Nuisances*, § 844.

If it be apparent that the dam or embankment has increased the quantity of water which may flow or stand upon the roads or lanes referred to in the original bill, and that it is of peculiar injury to the complainants, they are not now in a condition to complain of it. They are the original wrongdoers, and the injury is one of the results of their wrongful act in flooding the lands of the defendant.

A party in contempt for a real, substantial, not a mere technical disobedience of an injunction, a disobedience for which the chancellor would impose punishment, will not be heard on a motion for its dissolution until the contempt is purged. But where the nature and extent of the punishment to be imposed for the contempt depend on the determination of the question, whether the injunction shall be continued or dissolved, and involves essentially the inquiry, whether it was not in the first instance improvidently granted upon the *ex parte* showing of the complainant, the motion for a dissolution may be entertained.—*High on Inj.* 875; *Endicott v. Mathis*, 1 Stockton Ch. 110. The violation of the injunction in the present case was not deemed by the chancellor deserving of punishment, and not being punishable, the motion for dissolution was properly entertained.

The result is, the decree of the chancellor must be reversed, a decree here rendered dissolving the injunction, and the cause will be remanded.

[Jackson v. Smith.]

## Jackson v. Smith.

### *Action on Attachment Bond.*

1. *Attachment bond; vexation alone no ground of recovery.*—Vexation without wrong gives no right of action; and hence, in a suit on an attachment bond, no recovery can be had unless the attachment was wrongful.

2. *Same; liability on, when attachment wrongful.*—If, when an attachment is sued out, no statutory ground for it exists, it is wrongful, no matter how honestly or sincerely the plaintiff may have acted in suing it out; and for such wrongful act, although done by an agent without express direction, the principal and sureties on the attachment bond are liable.

3. *Same; damages as affected by probable cause; when malice inferred.* When an attachment is sued out by one having probable cause for believing the facts exist which, if true, would authorize an attachment, only actual damages can be recovered, although in fact no ground existed; but if, in such case, there is no sufficient evidence of probable cause, the jury may infer malice or vexation from the absence of such proof, and vindictive or exemplary damages may be recovered.

4. *Same; exemplary damages not recoverable on unauthorized malice of agent.*—A principal is not responsible for the malice, vexation or wantonness of his agent in suing out an attachment, unless he authorized or participated in it; and such authority or participation, to render the principal liable, must be proved; it can not be inferred from the mere relation of principal and agent.

5. *Same; when evidence of agent's malice inadmissible.*—In a suit on an attachment bond, whether against the principal or surety, the unauthorized malice or vexation of the agent not being a ground of recovery, evidence of it should not be allowed to go to the jury.

6. *Same; measure of actual damages.*—Damages, to be recoverable in an action on an attachment bond, must be the natural and proximate result of the wrongful, or wrongful and vexatious suing out of the attachment; they must not be the accidental, contingent, or speculative consequence resulting therefrom.

7. *Same; what evidence inadmissible.*—In an action on an attachment bond, it is not competent for the plaintiff to testify that the effect of the attachment on him was to prevent him from making a crop, and from doing any business, and that it ruined him; or to prove that he was a man of limited means.

8. *Same.*—It was further held that the primary court erred in allowing proof to be made in this case by the plaintiff, (1) when and how he obtained money which he placed on deposit with his surety on a replevy bond executed by him in the attachment suit, the fact of such deposit not having been proved against him; (2) how he had lived after the attachment was levied, it not being in rebuttal to any thing proved against him; and (3) that the plaintiff said to witnesses that he was not going to Texas, when it is not shown to have been a part of the *res gestæ*.



[Jackson v. Smith.]

Tried before R. F. LIGON, Esquire, acting as Special Judge. This was an action by F. A. Smith against W. S. Jackson and J. C. Smith, the nature of which is stated in the opinion. The cause was tried on the plea of the general issue, the trial resulting in a verdict and judgment for the plaintiff. On the trial, as shown by the bill of exceptions, the plaintiff read in evidence the bond sued on, and the writ issued in pursuance thereof, dated 5th January, 1882, but not the affidavit on which it was issued; nor is it disclosed by the record on what ground the attachment was sued out, or upon what property it was levied. The plaintiff was allowed, against the defendants' objection and exception, to read in evidence an attachment that was issued in favor of Wilcox, Gibbs & Co on 2nd January, 1882, "which is in form and substance the same as the attachment above set out, except in date, and issued out of the same court, and by the same officer, and for the same debt." The plaintiff also showed that the last named attachment was dismissed, after notice to plaintiff's attorneys, on 3rd January, 1882; and, as the defendants' evidence tended to show, it was dismissed on account of a defect in the proceedings. The plaintiff, having introduced evidence tending to show that, at the time the attachment dated 5th January, 1882, was issued, he was not about to remove out of the State, was examined as a witness on his own behalf. Having been examined on cross-examination "as to whether his credit was not based upon his property rather than upon personal credit," in rebuttal he was asked by his counsel, "What effect did the issuance of the attachment have on you;" and to this question he replied, "It prevented me from making any crop and doing any business." To this question and answer the defendants separately objected; and, their objections having been overruled, they duly excepted. The plaintiff was also asked by counsel the following questions, and made answers thereto as follows: Ques. What effect did the issue of said attachment have? Ans. It ruined me. Ques. Were you enabled to get credit upon the faith of the property you then had? Ans. I was. Ques. Was farming profitable or not in 1881? Ans. It was not. Ques. Where did you get the money from that you deposited with Mr. Williams, the surety on your replevy bond in the attachment? Ans. I sold the property attached and turned over the proceeds of sale to him. To each of said questions and answers the defendants separately objected; but their objections were overruled, and they duly excepted. Evidence having been introduced tending to show that the plaintiff was living on a farm some miles from Tuskegee at the time the first attachment was issued, and that not long afterwards he moved to Tuskegee, the plaintiff was asked how he had lived

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since he moved to town, to which he replied that he had lived with certain named kinsmen. To the question and answer the defendants separately objected; but their objections were overruled, and they duly excepted. By another witness the plaintiff was allowed to prove, against defendants' objection, that he, plaintiff, was a man of limited means; and to this ruling the defendants excepted. By one Willis the plaintiff was allowed to show, against the defendants' objection, that the plaintiff said to him that "he was not going to Texas; that he intended to move to town;" and by one Mary Seals he was allowed to show, against defendants' objection, that the plaintiff said to her that "he was not going to Texas." To each of these rulings the defendants excepted. The bill of exceptions does not disclose the time, connection or circumstances of these declarations. The plaintiff also introduced evidence tending to show that an agent of the plaintiff went to the defendant Jackson, after the first attachment, and before the second was issued, and said to him "that if the plaintiff ever had any intention of going to Texas, he had none then, and for God's sake not to have another attachment issued against him;" also evidence tending to show that "he had been damaged in the sum of \$17.50, in having to employ counsel to defend said attachment suit, in the sum of \$8.00, costs of that suit, and \$24.60, expenses for keeping the property after it was attached."

The defendants' evidence tended to show that, at the time the attachment was issued, the plaintiff was about to remove from the State, and, about that time, both prior and subsequent thereto, he was disposing of his real and personal property; that the plaintiffs in attachment, Wilcox, Gibbs & Co., were residents of Georgia, and were not in this State at the time said writ was sued out; that defendant Jackson, as their agent, had the claim on which the attachment suit was founded, for collection; that "he, of his own accord, had the said attachment issued, with no other motive than that of collecting said claim;" and that he then had reasonable cause to believe that the plaintiff was about to remove out of the State, and that he acted under the advice of his attorneys in having the attachment issued. The defendants also proved the existence and amount of the debt on which the attachment was issued.

The foregoing is the substance of the evidence contained in the bill of exceptions, which does not purport to set it all out. The court charged the jury, at the plaintiff's request, *inter alia*, as follows (3) "In fixing actual damages, the jury may look to the proof of the several items of expenses, time of plaintiff, keeping stock, attorney's fees, and court costs." (4) "If the jury find that the attachment was maliciously

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sued out, in fixing vindictive damages, the jury may consider the testimony showing that the plaintiff was greatly vexed by the suits, broken up in business, and his credit ruined." (5) "An agent is presumed to act according to the instructions of his principal, that is to say, that Jackson was acting under instructions of Wilcox, Gibbs & Co.; and it is upon them to show that he transcended his instructions in order to remove such presumption." (8) "No matter on what evidence Jackson acted, no matter what probable cause he had, no matter how honestly he acted, yet, if the jury are satisfied that, at the time the writ was sued out, on 5th January, 1882, plaintiff was not about to remove out of the State, the attachment was wrongfully sued out." (10) "If the jury believe that, at the time of the suing out of the writ of attachment, on 5th of January, 1882, the plaintiff was not about to leave the State, then the attachment was wrongfully sued out, and the defendants are liable for the actual damages."

To each of these charges the defendants duly excepted; and also to the refusal of the court to give each of the following charges requested by them in writing: (1) "If the jury believe from the evidence, that Jackson was the agent of Wilcox, Gibbs & Co., in the collection of the debt against the plaintiff, and that said Jackson maliciously sued out the attachment in this cause, such malice affords no ground for a recovery of vindictive damages in this case, unless it is shown that Wilcox, Gibbs & Co. participated in the malice of said Jackson." (2) "That the malice of Jackson, if any, in suing out the attachment in this case, as the agent of Wilcox, Gibbs & Co., can not be considered by the jury in estimating vindictive damages." (3) "The malice of Jackson has nothing to do with the question of vindictive damages in this case, unless it is shown from the evidence, that the conduct of Jackson, from which malice, if any, may be inferred, was authorized by Wilcox, Gibbs & Co." (4) "That the liability of the defendant J. C. Smith on the bond sued on, to the plaintiff for vindictive or exemplary damages, can not arise, unless Wilcox, Gibbs & Co. acted maliciously in suing out said attachment." (5) "As the only evidence in this case, as to the issuance of this attachment, is, that it was sued out by W. S. Jackson, the defendant, as the agent of Wilcox, Gibbs & Co., and as there is no evidence that said Wilcox, Gibbs & Co. participated in, or authorized the issuance of said writ, the question of vindictive damages does not arise." (6) "Unless the jury believe from the evidence, that Wilcox, Gibbs & Co. sued out the attachment in this case maliciously, they will not consider the question of vindictive or exemplary damages." (7) "If the jury believe from the evidence, that Jackson, as



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the agent of Wilcox, Gibbs & Co., maliciously sued out the attachment in this case, then such malice can not be imputed to Wilcox, Gibbs & Co., but it devolves upon the plaintiff to show that they participated in it." (8) "That the malice, if any, of Jackson can not be imputed to J. C. Smith, his co-defendant." (9) "The malice of Jackson, if any, can not be imputed to Wilcox, Gibbs & Co." (10) "That the defendant J. C. Smith is not responsible on the bond in this case for vindictive or exemplary damages, unless Wilcox, Gibbs & Co. sued out the attachment in this case wrongfully and vexatiously."

R. H. ABERCROMBIE and J. A. BILBRO, for appellants.

W. C. BREWER and W. C. McIVER, *contra*.

STONE, J.—Jackson, as the agent of Wilcox, Gibbs & Co., sued out an attachment against Smith, and himself with another became sureties on the attachment bond, with condition to "prosecute said attachment to effect, and pay the said defendant all such damages as he may sustain by the wrongful or vexatious suing out said attachment." The present suit was brought by Smith on the attachment bond, and alleges that that suit was both wrongful and vexatious. The plaintiff also claims special damages, first, for costs and attorney's fees incurred in defending said attachment suit; second, in having his property seized and taken from his possession, and third, in the loss of his credit and good name, in consequence of the suing out of said attachment. The suit is against the sureties on the bond—the attaching creditors not sued.

Unless the attachment was wrongful, there should be no recovery; for vexation without wrong gives no right of action. If no one of the statutory causes for attachment existed in fact, then the attachment was wrongful, no matter how honestly or sincerely the agent may have acted in suing it out. And for such wrongful act, although done by an agent without express direction, the principal and all the bondsmen are liable. And when attachment is sued out by one having probable cause for believing the facts exist, which, if true, would authorize attachment, then only actual damages can be recovered, although in fact no ground existed. So, if in addition to the absence of statutory ground for attachment, there be malice or vexation in suing out the writ, then damages may be recovered beyond the actual injury; and if there be no sufficient evidence of such probable cause for belief, the jury may infer malice or vexation from the absence of such proof. And, no cause for attachment in fact existing, if this statutory and

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somewhat extraordinary remedy be resorted to harshly, rashly, recklessly, or wantonly, the jury should consider this in determining whether there is malice or vexation. The principal, however, is not responsible for the malice, vexation, or wantonness of the agent in suing out the process, unless he authorized or participated in it; and such authority or participation, to render the principal liable, must be proved. It can not be inferred from the mere relation of principal and agent. And in a suit on the bond, whether against the principal or surety, the unauthorized malice or vexation of the agent can not be the ground of recovery, and should not be allowed to go to the jury. The relation of principal and agent in such service, when there is no evidence to connect the principal with the transaction, other than the fact that the process is sued out by agent, fastens a liability on the principal for actual damage, if the writ be wrongful. It goes no further.—1 Brick Dig. 171, §§ 263 *et seq.*; *Hamner v. Pounds*, 57 Ala. 348; *Durr v. Jackson*, 57 Ala. 203; *Bolling v. Tate*, 65 Ala. 417; *Lienkauf & Strauss v. Morris*, 66 Ala. 406; *Pollak v. Gantt*, 69 Ala. 373; *City National Bank v. Jeffries*, 73 Ala. 183; *Foster v. Napier*, 74 Ala. 393; *Kirksey v. Jones*, 7 Ala. 622; *Floyd v. Hamilton*, 33 Ala. 235.

Damages, to be recoverable, must be the natural and proximate result of the wrongful, or wrongful and vexatious suing out of the attachment. They must not be the accidental, contingent, or speculative consequence. These furnish too variable and uncertain a standard for the measurement of pecuniary liability. We have, in our various rulings, settled very many, if not all the questions this record presents. We will not recapitulate all we have said, but will refer to some of the cases in which we have expressed ourselves. In *Bolling v. Tate*, *supra*, we said: "The fees (attorneys') recoverable are not necessarily for the defense of the whole action. They are limited to that part of the defense, or the whole, as the case may be, that may be rendered necessary by the writ of seizure, or injunction complained of." See also *Hamner v. Pounds*, *supra*. So, in *Bolling v. Tate*, we said: "The circuit court rightly disallowed plaintiff's claim for expenses, in coming from Pensacola to Greenville. This was but the accident of the case, and too remote to be the subject of a recovery." The case of *Foster v. Napier*, 74 Ala. 393, was a suit on a detinue bond. The plaintiff, against the objection of defendant, was allowed to prove his loss of time and hotel bills paid, first, in procuring sureties on his replevin bond, and, second, in attending the trial of the case. We said: "In this the circuit court erred. Such damages are too remote and variable." Any damage actually sustained by the seizure and detention of the chattels, if

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the attachment was wrongful, is a legitimate subject of recovery.—1 Sedge. on Dam. (7th Ed.) 218, note *a*; 2 Wait Ac. and Def. 463; Sutherland on Dam. 165-6; Field on Dam. 423.

The circuit court erred in the following particulars:

In receiving evidence of the prior attachment sued out.

In allowing the plaintiff to testify that the effect of the attachment on him was, to prevent him from making any crop, and from doing any business, and that it ruined him.

In permitting the plaintiff to state where and how he obtained the money which he placed on deposit with his surety on the replevin bond, unless the fact of such deposit had been first proved against him.

In permitting testimony as to how plaintiff had lived since his removal to town, unless this was in rebuttal to something proved against him.

In receiving proof that Smith was a man of limited means.

In permitting the witness Willis to testify to what plaintiff said to him about going to Texas. Such statement is some times allowed to be proved as *res gestæ*, but it is only as explanatory of some act done, or enterprise entered upon.—1 Brick. Dig. 84<sup>3</sup>-4, 5, 6, §§ 556, 576, 590, 591, 593. We find no evidence in this record to authorize the proof of this declaration by plaintiff. The same rule applies to testimony given by Mary Seals.

Charge number three, given at plaintiff's instance, is faulty, in that it permitted plaintiff to recover for time lost in attending to the suit. Charges four, five and seven, given for plaintiff, are misleading.

Of the chages requested by defendant, and refused, ten in number, all should have been given, except four and five.

Reversed and remanded.

## Roberts v. Pippen.

*Action against Judge of Probate for Penalty for issuing Marriage License to Minor in Violation of Provisions of the Statute.*

1. *Repeal of statutes by implication not favored.*—The repeal of statutes by implication is not favored; and, ordinarily, the courts will not declare a prior statute to have been repealed by a subsequent one, in the absence of express words, unless the provisions of the two are directly repugnant.

2. *When statute not repealed by implication.*—The act of March 1st,



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1881 (Pamph. Acts, 1880-1, p. 31), amending section 2681 of the Code of 1876, which prescribes a penalty against probate judges for issuing marriage licenses to minors in certain cases, after providing that nothing contained in the act should "affect the liability of probate judges incurred for the issuance of licenses" prior to the passage of the act, repeals the section as it then stood. This act was itself amended by the act of February 5th, 1883 (Pamph. Acts, 1882-3, p. 38), the provisions of which are expressly made to apply to "all suits that hereafter may be brought, or which are now pending under section 2681 of the Code, as amended" thereby, or by the act of March 1st, 1881; and which repeals "all laws and parts of laws in conflict with the provisions of this act." Held, that the act of February 5th, 1883, did not repeal the saving clause of the act of March 1st, 1881, or affect a suit brought under section 2681, as it originally stood, and pending on 1st March, 1881.

3. *When averment in complaint mere descriptio personæ.*—Where, in an action against a judge of probate for issuing a marriage license to a minor, etc., under section 2681, as it originally stood, the complainant describes the minor to whom the license was issued by her name, and the further designation, that she is the plaintiff's daughter, the latter words are merely *descriptio personæ*, which it is not necessary to prove, the original statute authorizing a recovery of the penalty by any person who elected to sue for it.

4. *Falsus in uno, falsus in omnibus; when maxim has no application.* The maxim, *Falsus in uno, falsus in omnibus*, has no application to cases in which a false statement is inadvertently, and not willfully made by a witness.

#### APPEAL from Greene Circuit Court.

Tried before Hon Wm. S. MUDD.

This was an action by Phil. Pippen, suing on his own behalf, and on behalf of the State of Alabama, against Thomas W. Roberts, in which the plaintiff sought to recover of the defendant the sum of five hundred dollars, the penalty provided by section 2681 of the Code of 1876, for his issuing, as judge of probate, to Fanny Pippen, "daughter of said plaintiff, Phil. Pippen, an infant under the age of eighteen years," etc., "a marriage license for the celebration of the rites of matrimony" between the said Fanny and one Cary Foster, contrary to the provisions of the statute. The suit was commenced on 27th January, 1881, and was tried at the fall term, 1882, of said court, the trial resulting in a verdict and judgment for the plaintiff.

The plaintiff, after proving the issue of the license by the defendant as judge of probate, and the marriage of the parties in pursuance thereof, was examined as a witness in his own behalf, and testified, in substance, that over thirty years ago he was married to Julia Pippen, when they both were slaves, and from the day of their marriage to the time of the trial they had lived together as man and wife; that the said Fanny was his daughter, and when she married she was in her sixteenth year; and that he was not present when the license was issued, and knew nothing about it. On cross-examination, the plaintiff testified, among other things, that his daughter Fanny was

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born "since he was freed, or since freedom;" that his daughter "next to Fanny" was then going on sixteen years of age, and she was also "born since freedom;" and that he could not tell what year he was emancipated. Another witness for the plaintiff testified that the said Fanny was born in August, 1863, and was in her sixteenth year when she was married.

The defendant was examined as a witness in his own behalf, to whom his counsel propounded the following questions, to each of which the plaintiff separately objected, his objections were sustained, and exceptions were duly reserved by the defendant, to-wit: (1) Whether, at the time he issued said marriage license, Cary Foster made any statements to him as to the age of Fanny Pippen; (2) whether, at the time of, and before witness issued said license, Cary Foster and one Morris made an affidavit that said Fanny was over the age of eighteen years; (3) whether Phil. Pippen, after the issue of said license, and after the marriage, did not admit to him that he had given his consent to said marriage; (4) whether, after the license was issued, and after the marriage, Phil. Pippen did not give his consent to said marriage, and ratified it; and (5) whether, at the date of the issue of the license, in his judgment, the said Fanny was eighteen years of age. The defendant testified that he knew the said Fanny before the license was issued, and that "she was then as large as she is now." The defendant offered to prove by another witness, that after the license was issued, and the marriage was consummated, the plaintiff signed a paper writing, in these words: "I consent to the marriage of my daughter Fanny to Cary Foster, and request that a license issue for that purpose;" and consented that the paper should be ante-dated, and made to read as of the 28th May, 1880; and that said paper had been, after it was signed by the plaintiff, filed in the office of the judge of probate, by the plaintiff's consent, with the bond that Cary Foster had made when the marriage license was procured. To this proof the plaintiff objected, his objection was sustained, and the defendant excepted. The plaintiff offered other evidence tending to show that the said Fanny was his daughter; and the defendant offered testimony "tending to show that said Fanny, from her appearance and developments, was, at the date of the issuance of said license, eighteen years of age."

As recited in the bill of exceptions, "at the close of the testimony on the part of the defendant, Fanny, the person mentioned in plaintiff's complaint, was called to the witness stand by defendant's counsel, but no question was asked her by them; but they stated that they simply wished to make profert of said Fanny, that the jury might see the difference in color between said Fanny and the said Phillip Pippen, and have them to de-

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termine whether said Phillip was in truth and in fact the father of said child. Phillip Pippin had been on the stand as a witness for himself, and he was a black man, and had the appearance of a full-blooded negro. Fanny was of a lighter complexion, her color being that of a brown or dark-colored mulatto. There was no evidence of the color of Julia, the mother of said Fanny."

The foregoing being the substance of the material facts disclosed by the evidence, the defendant requested the court in writing to give the following charges: (1) "During the existence of slavery in Alabama, slaves were incapable of contracting valid marriages, and since the abolition of that institution, although connubial relations between slaves, existing at the time of emancipation, were declared valid marriages by ordinances and legislative acts, enacted after the time of emancipation, nevertheless, it is only the actual issue of such marriages which is legitimatized; and, therefore, unless the jury believe from the evidence that Fanny Pippen was begotten by Phil. Pippin, there is a variance between the allegations and the proof, and they must find for the defendant." (2) "If the jury, from the evidence, believe that Phil. Pippen swore falsely when he said that Fanny was born after he was freed, or freedom took place, then the jury can look to that fact in weighing the testimony of Phil. Pippin, and may, if they see proper, disregard his testimony." These charges the court refused, and the defendant duly excepted.

The rulings above noted are here assigned as error.

THOS. SEAY and J. P. McQUEEN, for appellant.

II. C. TOMPKINS and THOS. W. COLEMAN, *contra*.

SOMERVILLE, J.—The present is a *qui tam* action against the probate judge of Greene county for issuing a license to marry to a *minor*, in violation of the provisions of the statute. Code, 1876, § 2678. The action was brought on the twenty-seventh of January, 1881, under section 2681 of the Code, which reads as follows:

"A judge of probate issuing a license to marry contrary to the provisions of this article, forfeits five hundred dollars, one-half to the State, and the other half to the use of *any person who may sue* for the same."

This section was amended by the act approved March 1, 1881, entitled "An act to amend section 2681 of the Code," found on page 31 of the Session Acts of 1880-81. This amendment authorized the jury to excuse or justify the issuance of the license so as to defeat the forfeiture, if the minor applying for



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it made affidavit of his or her having obtained the requisite age, and presented at the same time such a personal appearance as would reasonably justify such a conclusion. After further declaring that *nothing contained in the act should "affect the liability of probate judges incurred for the issuance of licenses" before the passage of the act*, section 2681, as it stood in the Code at that time, was expressly repealed.

On February 5th, 1883, the above act of March, 1881, was itself amended in several particulars.—Acts 1882–83, pp. 38–9. The penalty was reduced to two hundred dollars, and the right to sue conferred on the parent or guardian for the use of the ward. Omitting mention of other changes immaterial to the question under consideration, we designate the following sections of the last amended act as of most importance in their bearing:

"Sec. 2. *Be it further enacted*, That in all suits that hereafter may be brought, or which are now pending under section 2681 of the Code, *as amended* by an act entitled 'An act to amend section 2681 of the Code,' approved March 1, 1881, or as amended by this act, where it appears that the parent or guardian consented to the marriage, this shall be a defense to said suit.

"Sec. 3. *Be it further enacted*, That all laws and parts of laws *in conflict with the provisions of this act*, be and they are hereby repealed."

The question presented for decision is, whether suits brought under section 2681 of the Code, *as it originally stood*, and which are specially exempted from the operation of the first amendatory act of March 1, 1881, are affected by the last act of February, 1883. It is contended by appellant's counsel that the *saving clause*, preserving the rights of litigants as to such suits, is repealed by the act of 1883, and that the plaintiff's right of action, in the present case, to the statutory penalty is thus destroyed.

Without admitting that the principle invoked, which forbids the enforcement of a mere statutory penalty after repeal of the statute conferring the right to the penalty, has any application after the right has been reduced to judgment, as was done in this case before the passage of the act of February, 1883, we are of opinion there has been no repeal of the saving clause in the act of March, 1881, which reserved rights of action then already accrued under section 2681 of the Code of 1876.

It is not insisted that the repeal is express, but only by implication. The rule is settled that the repeal of statutes by implication is not favored by the law. In order to harmonize legislative acts, courts are required to adopt, if necessary, rules of fair and liberal construction. If it be possible to reconcile

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the two statutes so as to permit both to stand, without violating sound principles of construction, this will be done. The court will not ordinarily declare a prior act to be repealed by a subsequent one, in the absence of express words of repeal, unless the provisions of the two are directly repugnant, or, as frequently expressed, irreconcilably inconsistent.—*Pearce v. Bank of Mobile*, 33 Ala. 693; *George v. Skeates*, 19 Ala. 738; 2 Brick. Dig. p. 463, §§ 44, 45; Sedgwick's Stat. and Const. Law (2nd Ed.), 98.

We can see no necessary repugnancy between the provisions of the act of 1883, and the *saving clause* in the act of 1881, under consideration. The legislative intention to preserve all rights of action which had accrued, before the passage of the latter act, under section 2681 of the Code of 1876, is very clearly expressed in the act of 1881.—Acts 1880–81, p. 31. It is not insisted that any repeal is affected by section 2 of the act of 1883, which only permits, as a defense, the fact of the parents' or guardians' *consent* to the marriage, in two classes of cases, (1) Such as might be brought under the act of 1883, and (2) such as had been brought under the act of 1881, or, more specifically, under section 2681 of the Code *as amended* by that act. No allusion is made to suits brought under this section of the Code, as *it originally stood before amendment*, and the present suit is of that class, being expressly preserved by the saving clause in question. "The effect of a reservation, or saving, in the repeal of a penal statute," as observed by Ormond, J., in *Pope v. Lewis*, 4 Ala. 492, "as to suits commenced under it, *is to continue the statute in force quoad such suits.*"

The particular contention here made by counsel is, that a repeal of this clause was effected by section 3 of the act of 1883, which declares that all laws and parts of laws, *in conflict* with the provisions of this last act, "be and they are hereby repealed." It is obvious, however, upon careful consideration, that there is no necessary conflict between the scope of this act and the operation of this saving clause. The act of 1883 does not purport to make any provision for suits instituted under section 2681 of the Code, as it originally stood before amendment. It purports only to affect suits brought under the act of 1881, and such as might afterwards be brought under the act of February 5th, 1883. It nowhere encroaches upon the field of operation reserved by the saving clause. It says nothing about suits brought under section 2681 of the Code. There can therefore be no repugnancy between the provisions of the last act and the saving clause. There is full scope for the operation of the two without any conflict.

It is apparent, without argument, that the various exceptions to the rulings of the court on the evidence were taken upon

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the theory that the present action was modified by the act of March 1, 1881. In view of the conclusion which we have reached above, that all suits brought under section 2681 of the Code, as it originally stood, are entirely unaffected by either of the amendatory acts of 1881, or of 1883, the assignments based on these exceptions must be overruled. The statement of the defendant Roberts as to the age of the minor, Fanny, must be construed as the averment of a mere *opinion* based upon the personal appearance of the girl, and not of a *fact* based upon his knowledge of her age.

The first charge requested by the defendant was properly refused. The designation of the minor in the complaint as *the daughter* of the plaintiff was a mere *descriptio personæ*, fully sustained and nowhere contradicted by the evidence; but it was entirely immaterial to authorize a recovery, both in point of allegation and of proof. The maxim, *Falsa demonstratio non nocet*, applies here, and authorizes the rejection as surplusage of "any false description that is not vital to the object of controversy.—1 Whart. Ev. § 412. The penalty under the new statute is given to the parent, or guardian, but under the law governing the present action it was given to any person who elected to sue for it.—Code, 1876, § 2681.

Nor can we see any error in the refusal of the last charge requested by the defendant. It is an attempt to improperly apply the maxim, *Falsus in uno, falsus in omnibus*, which has no application to cases where a false statement is *inadvertently* and *not willfully* made by a party, or other witness. Such falsehood should not only be corruptly asserted, but should go to "the core of the witness' testimony," before a jury is authorized to reject his entire statement as unworthy of credit on the principle intended to be embodied in this maxim. 1 Whart. Ev. § 412, *note* 2, and cases cited. The charge in question was clearly erroneous when tested by these principles.

The judgment is affirmed.

## Lowery v. Peterson.

### *Bill in Equity to enforce Vendor's Lien on Land.*

1. *Vendor's lien, when title retained; nature of.*—When a vendor of lands retains in himself the legal title, covenanting to convey it at a future day, upon condition that the vendee makes payment of the purchase-money, he carves out his own security, which is in the nature of a mortgage, and to which all the essential incidents of a mortgage attach.



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2. *Vendor's lien ; distinction between, when title conveyed and when retained.*—There is a plain and recognized distinction between the equitable lien which a vendor of lands has, when he conveys the legal title, and the security he carves out for himself, when he retains the legal title, covenanting to part with it only upon the payment of the purchase-money. In the latter case, independent of statute, a transfer by delivery of a note or bond given for the purchase-money passes, in equity, the security retained for the debt.

3. *Assignment of debt in equity ; what operates as.*—In a court of equity, an assignment of a debt may be in writing or by parol, and no particular form therefor is essential ; it is sufficient if there is an intentional transfer or making over of the subject-matter, conferring a complete and present right on the assignee.

4. *Lien on lands for purchase-money ; when vendor can not dispute his own title.*—A vendor of lands, retaining in himself the legal title as security for the payment of the purchase-money, can not, as against an assignee of a note given for the purchase-money, seeking to enforce the security, be heard to dispute his own title, or to aver that he has not an estate in the premises co-extensive with that he has covenanted to convey.

5. *Stipulation for forfeiture in contract for sale of land ; when waived.* A stipulation in a contract for the sale of land, providing for a forfeiture of the contract if the purchase-money is not paid as it becomes due, and binding the purchaser, in the event of forfeiture, to pay rent, is reserved for the benefit of the vendor, and may be waived by him ; and it is waived by his accepting part payment of the first installment of the purchase-money before it is due, and by transferring a part of the installment in payment of a debt.

## APPEAL from Pickens Chancery Court.

Heard before HON. THOMAS COBBS.

On 23d October, 1879, J. W. F. Lowery entered into a written contract with M. G. and B. F. Cospers, by which he "contracted and agreed to sell" to them a designated tract of land in Pickens county, in this State, at and for the sum of \$1,655.40, payable in three equal installments, one on 1st January, 1881, one on 1st January, 1882, and the other on 1st January, 1883 ; and to execute and deliver to them a deed to said land, with covenants of warranty, on payment of the purchase-money. It was also provided in the contract that "if default be made in fulfilling this agreement, or any part thereof, on the part of the parties of the second part [M. G. and B. F. Cospers], then and in such case they are to pay to the party of the first part [J. W. F. Lowery] a yearly rent of two hundred dollars for each year, the same secured by a statutory lien ; and, in case of the above forfeiture, the said party of the first part, his heirs and assigns, shall be at liberty to consider this contract as forfeited and annulled, and to dispose of the said land to any other person in the same manner as if this contract had never been made." The installments of the purchase-money were not evidenced by any other writing than the said contract.

The bill in this cause was filed on 4th April, 1882, by A. J. VOL. LXXV.

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Peterson, claiming as assignee or transferee of an unpaid balance of the first installment of said purchase-money (a part thereof having been paid prior to the alleged transfer and before maturity), against J. W. F. Lowery and M. G. and B. F. Cosper, for the purpose of having declared and enforced a lien on the land for the payment of the amount of said purchase-money claimed by him. The defendants answered the bill; the said M. G. and B. F. Cosper, in a joint answer, admitting substantially the averments of the bill; while the said Lowery, in a separate answer, denied that the complainant was the assignee or transferee of any part of said purchase-money, insisted that the contract had been forfeited, and set up that his wife had a resulting trust in the land.

In the latter part of the year 1880, Lowery owed the complainant an account for \$440.50; and the complainant's evidence tended to show that he receipted this account, and, in consideration thereof, Lowery transferred the first installment of said purchase-money to him. The transfer was by parol, but was accompanied by delivery of the contract itself. On the other hand, the evidence introduced by Lowery tended to show that the complainant paid him for the Cospers, on account of said purchase-money, \$440.50, by receipting said account; he, at the same time, charging said amount to the Cospers. The opinion does not render it necessary to make a fuller report of the evidence.

On the hearing, had on pleadings and proof, the chancellor caused a decree to be entered, granting to the complainant the relief sought by him; and that decree is here made the basis of the assignments of error.

M. L. STANSEL and E. J. FITZPATRICK, for appellant.

D. C. HODO, *contra*.

BRICKELL, C. J.—When, as in the present case, a vendor of lands retains in himself the legal title, covenanting or agreeing to convey it at a future day, upon condition that the vendee makes payment of the purchase-money, he carves out his own security, which is in the nature of a mortgage, and to which all the essential incidents of a mortgage attach. The relation of the parties is analogous to, if not precisely, that which would have been created, if the vendor had made a conveyance of the legal estate, and, contemporaneously, the vendee had executed a mortgage to secure the payment of the purchase-money. For, as has been justly observed, there can not be a sensible distinction drawn between the case of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure payment.—*Bankhead v. Owen*, 60 Ala. 457.

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The land being a security for the debt, it follows that any transfer or assignment, not limited or qualified in exclusion of a transfer of the security, which passes the debt and the right to its payment, is in equity a transfer of the security. This has never been doubted in the case of a mortgage, and there is no room for doubting it in the analogous case of a vendor retaining the legal estate as security for the payment of the purchase-money.—*Bankhead v. Owen, supra*. The reason that a transfer of the debt in equity passes the mortgage, is, that a mortgage, in the contemplation of a court of equity, is a charge upon the land; and whatever will give the money, will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. *Martin v. Mowlin*, 2 Burrows, 979. The debt may be assigned wholly or partially; and if there is an assignment of but part of the debt, an equitable interest vests in the assignee, which a court of equity will protect and enforce.—2 Sto. Eq. § 1044. In such case, the security for the debt passes *pro tanto* by the assignment.—*Pattison v. Hull*, 9 Cowen, 747; *Thomas v. Wyatt*, 5 B. Munroe, 132.

It results from these propositions, that the contention between the parties resolves itself chiefly into a question of fact. That question is, whether there was an assignment to Peterson of a part of the debt for the purchase-money of the lands; or whether he made a partial payment of the debt, trusting for reimbursement to the personal responsibility of the vendees. There is a serious and irreconcilable conflict in the testimony; but after a careful consideration of it, we concur in the conclusion of the chancellor, that there is a preponderance in support of the claim, that there was a partial assignment, and not a partial payment of the debt. No particular form of assignment is essential in a court of equity; it may be in writing or by parol. It is sufficient, if there is an intentional transfer or making over of the subject-matter, conferring a complete and present right on the assignee.—1 Wait's Actions and Defenses, 363–68. A transfer by delivery of a bond, bill or promissory note, given by the vendee for the purchase-money of lands, would not, prior to the present statute, carry the equitable lien of the vendor. But that is not this case; there was and is a plain and recognized distinction between the equitable lien and the security the vendor carves out for himself when he retains the legal title, covenanting to part with it only upon payment of the purchase-money.—*Bankhead v. Owen, supra*. A transfer by delivery of a note or bond for the payment of money passes as fully as a transfer or indorsement in writing the beneficial interest, entitling the assignee or transferee to demand and receive the money, and to discharge or forgive the debt. Of necessity, it



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passes the security for the debt, which the vendor retained, or which may have been created by a mortgage. For in the contemplation of a court of equity, the debt is the principal thing, the security an incident.

Whether the wife of the vendor may not have a resulting trust in the lands, which, if enforced, will operate a destruction of the legal estate, could not have become a relevant, material inquiry, unless the purchasers had intervened for a rescission of the contract of purchase. The vendor, to defeat the rights of the assignee, to disappoint the assignment, can not be heard to dispute his own title, or to aver that he has not an estate in the premises co-extensive with that he has covenanted to convey.—*Stewart v. Anderson*, 10 Ala. 504.

The condition in the contract or agreement of the parties, that, in the event the vendee failed to pay the purchase-money, as it became due and payable, the contract should be forfeited, and the purchaser bound to pay rent, was reserved for the benefit of the vendor, and, at discretion, he could dispense with or waive it. And it was dispensed with or waived by any act on his part, clearly evincing an intention to treat the contract as a valid, subsisting contract of purchase.—*Dunpor's case*, 1 Smith's Lead. Cases (7th Am. Ed.), 93-136. The vendor received part payment of the first installment of the purchase-money before it was due, and then transferred a part of the installment in consideration of the payment of a debt of his own. There could not have been by conduct more plainly manifested an election to treat the contract of purchase as subsisting, freed from the condition of forfeiture. There was nothing to him, if advantage was to be taken of the condition, one-half of the sum in payment of which he assigned the first installment. Indeed, if the forfeiture was to be claimed, the assignment was wanting in subject-matter. This view is decisive of the question raised as to the effect of the failure of the purchasers to pay in full the first installment of the purchase-money.

We find no error in the record prejudicial to the appellants, and the decree must be affirmed.

## **Alabama Great Southern Railroad Company v. McAlpine & Co.**

*Action against Railroad Company for Damages to Stock.*

1. *Railroad companies; care and diligence in running trains.*—The rule governing the duty and liability of railroad companies in running

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their trains is, that their employees must bestow on the service that degree of care and diligence which very careful and prudent persons give to their own affairs of similar magnitude and delicacy.

2. *Same; presumption of negligence.*—When injury has been shown to have been inflicted by a railroad company, in the running of its train, the burden is shifted to the company to repel the imputation of negligence, by proof sufficient to establish a *prima facie* case of proper diligence.

3. *Same; non-observance of statutory rules; liability resulting from.* It is the duty of employees of railroad companies to observe the statutory regulations as to blowing whistle, etc. (Code, 1876, § 1699); and in case of injury done by a running train, which could be reasonably traced to a non-observance of these regulations, it becomes the duty of the company to prove that they had been complied with; but this principle can not be extended to such injuries as are not caused by non-observance of the regulations.

4. *Same; diligence required of, in running trains.*—The law does not require that a railroad company, in its management of a running train, should attempt the impossible in order to prevent injury or accident; yet, it must resort to the necessary appliances to prevent injury or accident, so long as there is hope; and, when sued, the *onus* is on the company to show the utter fruitlessness of any attempt that might be made.

5. *Same; when company not liable for injury to stock.*—If a moving train of a railroad company has a proper head-light and brakes in good order, is skillfully officered, is not running at undue speed, and the officers and agents directing the movements of the train are attentive and vigilant, and guilty of no negligence, then, if by reason of the weather, or other unavoidable hinderance, an animal on the track is not seen until it is too late to save it by the use of the appliances belonging to the train, the company is not liable for the loss or injury.

6. *Same; liability for interest on damages for injury to stock.*—A charge instructing a jury, in a case against a railroad company to recover damages for killing stock, that if they found the issues in favor of the plaintiff, they should ascertain the value of the stock killed, and return a verdict therefor, with interest thereon from the date of the loss to the time of the trial, is free from error.

APPEAL from Greene Circuit Court.

Tried before Hon. S. H. SPROTT.

This was an action by J. A. McAlpine & Co. against the Alabama Great Southern Railroad Company, a corporation operating a railroad in this State, to recover damages for injuries alleged to have been done to a mare and mule, the property of the plaintiffs, by the defendant's locomotive and train of cars, through and by reason of negligence and want of care on the part of defendant's agents in the management and running of said locomotive and train. The defendant pleaded (1) the general issue; (2) that at the times said mule and mare were alleged to have been injured or killed, they were not the property of the plaintiffs; and (3), in substance, that the plaintiffs suffered said mare and mule to run at large and on defendant's track, and that, therefore, the injuries complained of were caused by the wrong and negligence of the plaintiffs, and not from a want of proper care and diligence on the part of the defendant. Issue was joined on the first and second

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pleas, and a demurrer was interposed to the third, which was sustained by the court. The trial resulted in a verdict and judgment for the plaintiffs.

The plaintiffs, after showing ownership and the value of the mare and mule, introduced evidence tending to show that, on 4th November, 1881, the mule was killed by a locomotive attached to a train on defendant's road, going north-east, about three hundred and eighty-four yards south-west of Boligee, a regular depot or station on said road, at which station or depot a public road crossed said track; that "the whistling or signal post, at or near which the whistle for the station and road-crossing is usually blown," is about four hundred and ten yards further south-west from the station, thus making the signal post seven hundred and ninety-four yards south-west of said station; "that at the place where said mule was killed, there were on both sides of the railroad open lands used as a pasture, covered with ordinary swamp woods, which came down to defendant's right of way, on the north-west side of the track, about fifty feet from the iron rail of the track, but did not come down to it on the opposite side;" that the mare "was found about one-half mile from Boligee station, injured so as to render her useless; that she was blind in one eye, but could see a little out of the other; that she was seen on the track, which was straight, open and entirely unobstructed for more than a mile, in front of the passenger train of defendant, on November 26th, 1881, the distance not being definitely known; that the engine blew the stock alarm continuously from the time the train came in sight of a witness, who observed it from a point about four hundred yards from the railroad and from the mare; but the mare remained on the track shaking her head as if trying to ascertain from what direction the sound proceeded, until knocked off; and that the train slackened its speed from the time the whistle blew until it struck the mare, coming to a full stop shortly thereafter."

The evidence introduced on behalf of the defendant tended to show that the mule was killed after dark and after the engineer had given the usual whistle signals for Boligee station and the crossing thereat; that just prior to striking the mule, the brakes, which were the best in use, and of which the engineer had complete control, were applied in order to stop the train at the station; that from the time they were applied until the mule was struck, they were firmly held on; that at the time the brakes were applied the train was running at the rate of about twenty-seven miles per hour; that the engine was in charge of a competent and skillful man who had been a locomotive engineer for thirty years, and it had "a good head-light, which was lit and burning brightly" at the time of the



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accident; that the position of the engineer was on the right hand side, and that of the fireman on the left hand side of the engine; that both were in their respective places, and on the watch for obstructions, etc., at the time of the accident; that "the first the engineer saw of said mule, it was trying to cross the track from the left hand side of the road; it was first seen directly in front of the engine, just as he struck it;" that an engineer, from his position on the engine, can not, on account of the boiler and smoke-stack, see the left-hand rail of the track for about fifty feet in front of the engine; that, with the aid of the head-light, an engineer can see the entire right of way of the railroad one hundred and fifty feet ahead of the engine, and onward until the range of light is passed; that "the light from the head-light does not cover the entire right of way back of one hundred and fifty feet ahead of the engine, but only part, beginning with the road-bed, and slanting gradually outward until it reaches the outside lines of the right of way," which is, at the place of accident, one hundred feet wide; that "in running a passenger train at its usual rate of speed, one can stop the train between one hundred and one hundred and fifty yards, by the use of the said brakes and appliances for such purpose, but that it can not be stopped within that distance by any known appliances in use;" that "the engineer was looking forward when said mule was struck, and could have seen it, had it been anywhere on the right of way beyond one hundred and fifty feet in front of the engine, or anywhere in the line of light cast by the head-light; but it was not seen, nor was the mule on the right of way at the time the engineer could have seen it, and he did not see any other mule;" that the first time the fireman saw the mule, "it was about twenty feet from the engine, coming in a run, and jumped on the track immediately in front of the engine;" that when he saw the mule, he had just got up from shoveling coal into the furnace of the engine; that "from the time the mule was perceived until the injury had been done, it was impossible to do any thing known to skillful engineers, to avert or prevent the injury;" and that it was the fireman's duty to ring the bell when approaching stations, but he did not remember ringing the bell before striking the mule, though he did ring it afterwards until the station was reached.

The evidence for the defendant further tended to show that "the said mare was killed about 26th November, 1881, by a passenger train coming north-east, between one-half and three-quarters of a mile south-west of Boligee station, in an open field; that said train was in charge of competent and skillful employees, and supplied with the best known appliances in use on such service; that the mare was first seen standing on the

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track, about one hundred yards in front of the train, on a cold, frosty morning, about seven o'clock; that the engineer and fireman were in their usual positions, and on the look-out for obstructions; that the track was straight, and the mare would have been seen sooner, but the exceeding cold morning caused frost to continually form on the glass in front of the engine cab; that the engineer was continually wiping the glass in order to see ahead; that the fireman had also wiped the glass in front of him, on his side of the cab, but did not keep it well wiped, and he could not see through it well; that so soon as the whistle was blown, the fireman stuck his head out of the window, and kept it out, looking at said mare, until the engine struck her; that so soon as the mare was perceived, the usual cattle alarm was sounded, and the brakes were applied, and both continued until the mare was struck; that when the alarm was sounded, the mare did not move from the track, but only shook and moved her head from side to side, and remained standing on the track until she was struck and knocked therefrom; that the train stopped when the mare was about opposite the baggage car, the brakes were kept on, and held firmly down, and, when it was seen that the mare did not move from the track, the engine was reversed about twenty feet before the collision, but it was impossible to prevent the killing."

The foregoing being substantially all the evidence introduced on the trial, the court charged the jury, *ex mero motu*, "that if they found a verdict for the plaintiffs for both the mule and mare, they would ascertain the value of the property, and return a verdict for the same, with the interest thereon from the respective dates on which said property was injured to the present time." Defendant duly excepted to this charge, and also to the refusal of the court to give, at its written request, the following charges: 11. "If the jury believe the evidence in this cause, offered to them concerning the mare sued for, then it is their duty to find their verdict, so far as the mare is concerned, for the defendant." 12. "If the jury believe the evidence in this case in regard to the killing of said mule, then, in so far as said mule is concerned, their verdict must be for the defendant."

The rulings on the charges above noted are here, *inter alia*, assigned as error.

WOOD & WOOD, with whom were T. C. CLARK and J. P. McQUEEN, for appellant. (1) Charges 11 and 12, requested by the defendant, should have been given. The evidence discussed at length, and following authorities cited and commented on: *Alabama Great Southern R. R. Co. v. Jones*, 71 Ala. 487; *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150.

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(2) The general charge of the court, allowing interest in the event of a recovery, was erroneous.—*Marshall v. Schricker*, 63 Mo. 308; *Gilpins v. Consequa*, *Peters C. C. R.* 88; *Jean v. Sandiford*, 39 Ala. 317; *Sedg. on Meas. Dam.* 377; *The Isaac Newton*, 1 Abb. Ad. R. 588; *Texas & P. R. Co. v. Ferguson*, 9 Am. & Eng. R. R. Cases, 396; *Fowler v. Davenport*, 21 Texas, 635; *Houston, etc., R. R. Co. v. Muldrow*, 54 Tex. 233.

J. P. HEAD, *contra*. (1) Charges 11 and 12 were properly refused. As to the mare, there is abundant evidence of negligence; and, as to the mule, the evidence is positive, and not even disputed, that the requirements of the statute, as to blowing the whistle, or ringing the bell, were not complied with; and besides, there was evidence of negligence. (2) The charge of the court on the measure of damages was correct. The mare and mule were both instantly killed, and the value, with interest thereon, is a fair and proper measure of damages.—*Borden v. Bradshaw*, 68 Ala. 362.

STONE, J.—The present suit is for negligently killing a horse and mule by appellant's trains. The killings were at different times, and are controlled by different testimony. While the killing was, in each case, shown by plaintiff's evidence with sufficient certainty to authorize the jury to find the fact of the killings, the circumstances attending them were shown alone by the witnesses for the defendant, railroad company. There was no material discrepancy in the testimony.

The rule governing the duty and liability of railroads is, that their employes must bestow on the service that degree of care and diligence which very careful and prudent persons give to thier own affairs of similar magnitude and delicacy. This is the extent.—*Grey v. Mobile Trade Company*, 55 Ala. 387; *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *Ala. Gr. So. R. R. Co. v. McAlpine*, 71 Ala. 545. When injury has been shown to have been inflicted, the burden is then shifted on to the railroad company, to repel imputation of negligence, by proof sufficient to establish a *prima facie* case of such diligence. Section 1699 of the Code of 1876 has declared certain rules to be observed by railroad employes. These it is their duty to observe; and, in case of injury done by a train, which could be reasonably traced to a non-observance of these rules, it would then become the duty of the railroad company to prove that these rules had been complied with. But this principle only extends to such injuries as are caused by the non-observance of such rules. The railroad is not liable for every injury it may inflict. It is only liable for such damages as are



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done to persons, stock, or other property, which result from a failure to comply with the requirements therein expressed, or from some other negligence on the part of such company or its agents.—Code, § 1700. No matter how negligent the agents may be, if no one is injured thereby; no matter what injury may be suffered, if not caused or contributed to by the negligence of some agent in the control of the train, no liability is thereby fixed on the railroad company.—*M. & C. R. R. Co. v. Bibb*, 37 Ala. 699; *L. & N. R. R. Co. v. Williams*, 65 Ala. 74.

We have said that persons having the control of railroad trains in motion, must bestow that degree of care and diligence which very careful and prudent persons employ in their own private affairs of similar nature. To illustrate this principle, let it be supposed the engineer is the owner of the railroad, with all its interests and responsibilities, and the stock imperiled is his own. He is running on schedule time, must avoid collisions with other trains, must strive to make connections, and so maintain the accustomed speed of his train, that the reputation of his road for the transportation of passengers and freight be preserved. He is supposed also to entertain a due regard for the safety of his cattle. He will not be expected to stop his train upon every occasion of possible danger to his stock. If he did so, he would derange the schedule, and miss his connections. Neither will he be expected to run with unchecked speed throughout the whole line. He has at his command appliances for checking the speed of his train, for stopping it altogether, and frightening stock from the track. He is acquainted with the habits of cattle, and with the effect of the stock alarm upon them. If the cattle be on the track, he will sound the alarm, and at the same time check the speed of his train, so that if the alarm prove ineffectual, he can halt his train and thus save his stock. He would probably pursue this course, if the cattle were perceived a sufficient distance ahead, to give time for these several stages. If, however, with a sufficient headlight, with good brakes in good working order, and without any negligence or inattention on the part of the engineer, the cattle, not being seen, or seeable before, spring suddenly on the track, or become visible on the track, in so close proximity to the engine, that any attempt to stop the engine in time, or otherwise to prevent the collision, must fail, then there is no want of care, even if no attempt be made to stop the engine. The law does not require the impossible to be attempted. We mean, however, the impossible *in fact*. The appliances must be resorted to, so long as there is a hope; and the *onus* is on the railroad, if sued, to show the utter fruitlessness of any attempt that might be made. We are not attempting to

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weaken or destroy the rule declared in *S. & N. R. R. Co. v. Jones*, 56 Ala. 507. That case hinged on the fact that the ox was seen in dangerous proximity to the road a sufficient distance ahead of the train to require the application of preventive measures.

In *Ala. Gr. So. R. R. Co. v. Jones*, 71 Ala. 487, we, to some extent, explained and modified the rule we had declared in *M. & C. R. R. Co. v. Lyon*, 62 Ala. 71. We desire now, if necessary, to make that explanation more emphatic. Speaking of the former case, we then said: "It was not intended to assert more than that it is the duty of railroad companies to employ the best machinery and appliances which are in use, and the failure to employ them, in view of the hazardous agencies they control, the dangers necessarily incidental, is a want of the care and diligence a man of ordinary prudence would observe. The omission to provide them is a violation of the duty enjoined by law, and if there be no more in the particular case than the omission and consequent injury, the court may, as matter of law, declare there is actionable negligence. The proposition must, however, be accepted with limitations and qualifications. From unknown causes, the machinery and appliances may, in the course of travel, become defective, or natural causes may intervene which render it inefficient. The train can not be expected to stop on the track. The stoppage may involve more of peril than its continued running, as the machinery will permit; and if, under such circumstances, reasonable care and diligence are observed, negligence could not be imputed. If it were true that from fog, or from driving rains or snow, the light cast from a proper headlight was obscured, the running of the train with reasonable [i. e. proper] care, in view of that circumstance, could not be deemed negligent." And, indorsing what is there said, we repeat, if the train had proper headlight and brakes in good order, if it was skillfully officered, was not running with undue speed, and if the officers and agents directing the movement of the train were attentive and vigilant, and guilty of no negligence, then, if by reason of the weather, or other unavoidable hindrance, the animal was not seen on the track until it was too late to save it by the use of the appliances belonging to the train, the railroad company is not liable for the loss.

There is a correlation to the high degree of care and diligence exacted of those employed in the control of the steam engine. We have seen they are required to give to the service that degree of diligence, which very careful and prudent persons bestow on their own affairs of like magnitude and delicacy. The corporation they serve should be held liable for their actual or imputed dereliction, to the same extent, and only to

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the same extent, as individuals would be held liable for the same conduct, under the same circumstances, and producing the same result. If jurors properly observe their sworn duty, they, in rendering their verdicts, will be governed alone by the testimony allowed to be given to them, and by the charge of the presiding judge. This is the sum and interpretation of their oath, and they have no discretion, save to weigh the testimony impartially, that they may arrive at the facts, and render a conscientious verdict. Any thing less than this, in any jury trial, is a palpable wrong, a mockery of justice, and a disgrace to the administration of the law. Natural persons and corporations, the richest and the poorest, the highest and the humblest, are alike equal before the law, have the same, and only the same rights, and are under the same, and only the same liabilities. There is no room or place in the jury-box for prejudice or partiality.

Under the rules declared above, charge twelve asked by defendant—the charge relating to the mule—should have been given. As we have said, there was no conflict in the testimony, and if believed it clearly disproved every semblance of negligence on the part of the railroad's employes, that could in the least have contributed to the death of the mule. It was one of those unforeseen misfortunes, which no diligence or forethought could guard against, according to all the testimony bearing on the question. We also think charge number eleven should have been given. The other charges asked we need not consider. The ruling on demurrer and the charge as to interest are free from error.—*Borden v. Bradshaw*, 68 Ala. 362; *Ala. Gr. So. R. R. Co. v. McAlpine*, 71 Ala. 545.

Reversed and remanded.

## **Benedict, Hall & Co. v. Renfro Bros.**

*Creditors' Bill to have Mortgage on Stock of Merchandise declared Fraudulent and Void.*

1. *Mortgage on stock of merchandise; when fraudulent as against unsecured creditors.*—An insolvent debtor mortgaged his stock of merchandise, worth about \$6,000, some of which was of a perishable nature, to secure a debt of \$3,000; the mortgagee not knowing that the debtor was insolvent, but knowing that he was financially embarrassed; and it not appearing that the debtor owned any other property liable to the satisfaction of his debts. In the mortgage the express power to sell the merchandise, or any of it, is not retained by the mortgagor, but the merchandise is left in his possession, and, by implication, it is clear that it



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was the intention of the parties that he should remain in possession until the law-day, which was ninety days from the date of execution. *Held,*

(a) That it is a necessary conclusion that a power of sale was impliedly retained by the mortgagor, which was as much a part of the contract as if expressed.

(b) That the mortgage, operating, in the most effectual manner, to shield the property from the attack of the unsecured creditors, for the joint benefit of the mortgagor and mortgagee, inevitably tended to hinder and delay such creditors, and, as against them, it was, therefore, fraudulent and void.

(c) That the mortgage, impliedly enabling, as it did, the debtor to sell at his option, and appropriate the proceeds of sale to his own use, is, in effect, a conveyance "made in trust for the use of the person making the same," within the meaning of the statute, and is, for this reason, void as against the unsecured creditors.

2<sup>d</sup> *Same; when mortgagor in possession sells as agent of mortgagee; effect of.*—The court adds: "We are not to be understood as intimating in this opinion, that a mortgage of merchandise would be rendered conclusively invalid, where the mortgagor is, in good faith, left in possession of the goods, with power to sell for the exclusive use of the mortgagee, holding the proceeds of sale for his benefit. In such case, he may well be deemed the mere agent of the mortgagee, acting for him and in his behalf."

#### APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity, exhibited by Benedict, Hall & Co. and others, creditors of Crumley Bros., a mercantile partnership, "for themselves and all others who may join with them in filing the same, by bearing their part of the costs," against the said Crumley Bros., and against Renfro Bros., and others, for the purpose, among other things, of having declared fraudulent and void, as against the complainants, a mortgage executed by the said Crumley Bros. on the 35th December, 1878, conveying to the said Renfro Bros. a designated stock of goods, wares and merchandise, as security for a debt of \$3,000, which the former owed to the latter; and of having the property conveyed subjected to sale for the satisfaction of complainants' demands. The defeasance contained in the mortgage is as follows: "Upon condition, however, that if we pay or cause to be paid, at or before maturity, our promissory note for the sum of three thousand dollars, bearing even date with these presents, payable ninety days after date to the said Renfro Bros., then this conveyance shall be null and void. But if default be made in the payment of said note, then said Renfro Bros. shall be, and they are hereby authorized to take possession of said personal property, and sell the same for cash at public sale," etc. The other facts necessary to an understanding of the points decided, are sufficiently stated in the opinion.

The chancellor on the hearing, had on pleadings and proof, was of the opinion that the complainants were not entitled to

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relief, and caused a decree to be entered, dismissing their bill. That decree is here assigned as error.

W. H. BARNES, for appellant, cited *Price v. Mazange*, 31 Ala. 701; *Constantine v. Twelves*, 29 Ala. 607; *Tickner v. Wiswall*, 9 Ala. 305; *Crawford v. Kirksey*, 55 Ala. 282; *Robinson v. Elliott*, 22 Wall. 513; *Ryall v. Rolles*, 1 Ves. Sr., 348; *Worseley v. DeMattos*, 1 Burr. 467; *Edwards v. Harben*, 2 Term Rep. 587; *Wordall v. Smith*, 1 Camp. 332; *Reed v. Blades*, 5 Taunton, 212; *Lang v. Lee*, 3 Rand. 410; *Janney v. Barnes*, 11 Leigh, 100; *Sheppards v. Turpin*, 3 Gratt. 357; *Spence v. Bagwell*, 6 Gratt. 444; *Perry v. Shenandoah Nat. Bank*, 27 Gratt. 755; *Divver v. McLaughlin*, 2 Wend. 596; *Wood v. Lowry*, 17 Wend. 348; *Griswold v. Sheldon*, 4 N. Y. 581; *Edgell v. Hart*, 13 Barb. 380; s. c. 9 N. Y. 213; *Gardner v. McEwen*, 19 N. Y. 123; *Mitnacht v. Kelly*, 3 Keys, 407; *Russell v. Winne*, 37 N. Y. 591; *Southard v. Benner*, 72 N. Y. 424; *Brackett v. Harvey*, 91 N. Y. 214; *Coburn v. Pickering*, 3 N. H. 415; *Ranlett v. Blodgett*, 17 N. H. 298; *Putnam v. Osgood*, 51 N. H. 192; 52 N. H. 148; *Collins v. Myers*, 16 Ohio, 547; *Freeman v. Rawson*, 5 Ohio St. 1; *Hannon v. Abbey*, 7 Ohio St. 218; *Chophard v. Bayard*, 4 Minn. 533; *Stein v. Munch*, 24 Minn. 390; *Mann v. Flower*, 25 Minn. 500; *Steinart v. Deuster*, 23 Wis. 136; *Blakeslee v. Rossman*, 43 Wis. 116; *Greenebaum v. Wheeler*, 90 Ill. 296; *Dunning v. Mead*, *Id.* 376; *White v. Graves*, 68 Mo. 218; *Roeckel v. Jacob*, 2 Mo. App. 183; *Greeley v. Reading*, 74 Mo. 309; 4 Yerg. 540; *Simpson v. Mitchell*, 8 Yerg. 417; *Nat. Bank v. Ebbert*, 9 Heisk. 153; *Joseph v. Levi*, 58 Miss. 843; *Baldwin v. Flash*, *Id.* 593; s. c. 59 Miss. 61; *Bank v. Goodrich*, 3 Col. 139; *Orton v. Orton*, 7 Oregon, 478; *Kuhn v. Mack*, 4 W. Va. 186; *Garden v. Bodwig*, 9 W. Va. 121; *Hower v. Geesaman*, 17 Serg. & R. 251; *Bentz v. Rockey*, 69 Penn. St. 71; *Bishop v. Warner*, 19 Conn. 460; *Lewis v. McCabe*, 49 Conn. 141; *Sparks v. Mack*, 31 Ark. 666; *Tallon v. Ellison*, 3 Neb. 63.

J. M. CHILTON, *contra*. (No brief came to the hands of the reporter.)

SOMERVILLE, J.—No subject has, perhaps, been more discussed in the courts of this country, especially within the past few years, than the mortgage of stocks of merchandise, when the mortgagor is allowed, either expressly or by necessary implication, to retain possession with a reserved power of sale over the mortgaged property. The courts of the several States are in irreconcilable conflict on the question, whether the reser-

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vation of such a power conclusively vitiates the instrument for fraud, as matter of law, without regard to any specific intent to defraud, or whether it is a strong badge of fraud, furnishing only presumptive evidence of fraudulent intent as matter of fact for the jury, and capable of being rebutted by proof to the contrary by one who seeks to uphold the conveyance. The decisions will be found fully collected and reviewed at length by the various text-writers who have undertaken to treat of this particular subject. As well observed in *Robinson v. Elliott*, 22 Wall. 531, these cases "can not be reconciled by any process of reasoning, or on any principle of law."—Jones on Chat. Mortg. §§ 379, *et seq.*; Herman on Chat. Mortg. §§ 100, *et seq.*, p. 222; Mortg. of Merchandise (Pierce), §§ 33, *et seq.*; *Ib.* §§ 88 *et seq.*

The several decisions of this court, touching this general subject, are cited in *Commercial Bank of Selma v. Brewer*, 71 Ala. 574, and the rule so far established by them is stated to be, that the conveyance by an insolvent mortgagor of substantially all of his unencumbered property—consisting of an ordinary stock of merchandise—with a stipulation for retention of possession, and with reservation of a power of sale for the mortgagor's own benefit, would be void on the ground of its "inevitable tendency" to hinder and delay the creditors of the grantor. In this case it was considered not to be material that the fact of the mortgagor's insolvency was unknown to the mortgagee at the time of the execution of the conveyance. It was further added by the court that they might go further possibly and declare the instrument void on the ground that it reserved a benefit to the grantors.—*Constantine v. Twelves*, 29 Ala. 607; *Price v. Mazange*, 31 Ala. 701; *Wiley v. Knight*, 27 Ala. 336.

In the absence of all registry laws, the manual delivery of mortgaged personal property would be essential ordinarily to the validity of the transaction. But statutes providing for the recording of such instruments are a substitute for possession by the mortgagee, and repel any implication of fraud arising from the mortgagor's retention of possession, at least until the day of default not unreasonably prolonged.—Herman on Chat. Mortg. § 100; Jones on Chat. Mortg. § 380; *Hopkins v. Scott*, 20 Ala. 183. This has been justly said to be a concession to commerce, made in obedience to the growing exactions of trade.

The objection urged in the present case is not to any stipulation, express or implied, for the mortgagor's retention of possession merely, but to an implied reservation of a power of sale in the mortgagor for his own use and benefit, and the



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argument is, that this feature of the case operates to stamp the transaction with fraud.

The general principle is well stated by the Supreme Court of the United States, in the case of *Robinson v. Elliott*, 22 Wall. 523, where it is said that "the creditor must take care in making his contract, that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract." This principle is as ancient in our jurisprudence as *Twyne's case*, decided nearly three centuries ago, where the doctrine was settled that the retaining of goods in possession by a vendor, with the power of trading with them as his own, rendered the sale fraudulent and void as against creditors. The reason assigned was that "he continued in possession, and *used them as his own*, and by reason thereof he *traded and trafficked with others*, and defrauded and deceived them."—3 Coke, 80; s. c. 1 Smith's Lead. Cases (H. & W.), 33. The controlling principle of the case is, that the possession of property, with the accompanying power of dominion and disposition, is an incident of ownership, the right to which, in all honesty and justice, should be denied to any one except the absolute owner. The law, therefore, justly requires that all transfers or assignments of a debtor's property should be made in good faith for the purpose of paying or securing his debts, and "without any intent to lock up the property from creditors for the use of the debtor."—Bump on Fr. Conv. (3d Ed.) 399. Our present statute is a strong affirmation of this principle of law, and was designed more effectually, perhaps, to carry into effect the doctrine of *Twyne's case*. It declares that "all deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels, or things in action, *made in trust for the use of the person making the same*, are void against creditors, existing or subsequent, of such person." Code, 1876, § 2120.

We proceed to apply these principles to the case in hand. The property here mortgaged is a stock of ordinary merchandise, a portion of which is shown to be of a perishable nature. The value of the goods is shown to be between four and six thousand dollars, and the amount of the mortgage debt the sum of three thousand dollars. The mortgagors were insolvent at the time of the execution and delivery of the instrument,

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although this was not probably known to the mortgagees. The most that can be inferred is, that the financial embarrassment of the mortgagors was known. The grantors in the conveyance do not appear to have owned any other property liable to the satisfaction of their debts. No express power is conferred on the mortgagors to sell the goods, but they were left in possession of them, and by implication it was clearly understood, from the terms of the mortgage, that they were to remain in possession until the day of default, which was ninety days from the date of its execution. "The implication is irresistible," as observed by Bynum, J., in *Cheatham v. Hawkins*, 76 N. C. 335, 337, "from the very nature of the business that they [the mortgagors] were to continue in selling and trading as before; otherwise, why retain possession of goods which would be a dead incumbrance upon their hands, without the power of disposition?" It would be an incredible supposition that the mortgagors, under the circumstances attending this case, were expected to refund this borrowed money by closing their doors and locking up their merchandise, thus entirely abandoning their business. Especially is this true, in view of the fact that they did not pursue this course, but continued in possession, making sales of the goods as if they were their own, until arrested in this by the levies made by their various attaching creditors. It is a necessary conclusion that a power of sale was implied, and being implied, it was as much a part of the contract as if expressed.—*Freeman v. Rawson*, 5 Ohio St. 1; *Stanley v. Bunce*, 27 Mo. 269; Herman on Chat. Mortg. 235; *Gardner v. Johnston*, 9 W. Va. 403.

Such a power, when vested in a mortgagee, and accompanied with possession, obviously confers on him a dominion over the property, which is utterly inconsistent with the continued existence of the lien intended to be created by the mortgage. It is entirely repugnant to, and subversive of such lien. The instrument contains within itself, in its very inception, the mechanism of its own sure destruction. The mortgagor remains practically the owner of the property, with the right to sell and appropriate it at pleasure, without liability to account to the mortgagee, save at the mere option of the latter, which may never be brought into exercise until some other creditor seeks to call the debtor to account by levying upon the property. Such an instrument is, therefore, no valid security, but operates in the most effectual manner to shield the property from the attack of other creditors, for the joint benefit of the mortgagor and mortgagee, thus tending inevitably to hinder and delay such creditors.—Herman on Chat. Mortg. 227-236; Mortg. of Merchandise (Pierce), §§ 33 *et seq.*; *Ib.* § 155; *Wiley v. Knight*, 27 Ala. 336; *Com. B'k Selma v. Brewer*, 71

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Ala. 574; Jones' Chat. Mort. §§ 382 *et seq.*; *Lund v. Fletcher*, (39 Ark. 325), 43 Amer. Rep. 270; *Orton v. Orton* (7 Or. 478), 33 Amer. Rep. 717; *Cheatham v. Hawkins*, 80 N. C. 161; *Robinson v. Elliot*, *supra*; *Constantine v. Twelves*, 29 Ala. 607.

A mortgage, with such a power of sale, by which the mortgage debtor is enabled to sell at his option, and appropriate the proceeds of sale to his own use, is, as we have said above, virtually a conveyance "made in trust for the use of the person making the same," within the meaning of the statute, and this feature of itself stamps the transaction with invalidity.—Code, 1876, § 2120. In construing this statute, this court said, in *Reynolds v. Crook*, 31 Ala. 634, that it is essential to the validity of every trust conveyance, intended as a security, that its "whole purpose" should be the devotion of the property *bona fide* to the indemnification of the creditor, and that "if a part of its purpose is, that it shall avail or be used for the ease or favor of the grantor, it is void as to creditors."—*Miller v. Stetson*, 32 Ala. 161. The principle is essentially akin to that which pronounces every conveyance void which reserves a power of revocation in the grantor. The power to sell the mortgaged property and appropriate its proceeds does not differ in effect from a reserved power to *revoke* in whole or in part. In *Riggs v. Murray*, 2 John. Ch. 565, it was said by Chancellor Kent, in a case of this character, that the grantors had been "sporting with the property as their own," and the conveyance carried with it a necessary inference of a purpose to hinder, delay or defraud creditors. Such a power of revocation was said to be fatal to the instrument and to "poison it throughout." It was very long ago held that a reserved power to mortgage, or to sell, as the grantor might deem fit, was tantamount to a power of revocation, and therefore vitiated a conveyance for fraud.—*Tarback v. Marbury*, 2 Vermont, 510; Mortg. Merch. (Pierce) §§ 154 *et seq.* All cases of this general class come within the evils intended to be reached by *Twyne's case*, where it was said that "fraud is always apparelled and clad with a trust, and trust is the cover of fraud."

The authorities are numerous in support of these views. The Supreme Court of North Carolina, in discussing this subject in *Cheatham v. Hawkins*, 76 N. C. 335, say: "The power to sell was the power to destroy, and the sale was the destruction and extinction of the property. If there were other unsecured creditors at the time of this assignment, and no other property of the debtor than that conveyed in the mortgage, out of which creditors could make their debts, the fraudulent intent would seem irrebuttable. A clear benefit is secured to the debtor, and a clear right is withheld from the creditor be-



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yond what the law permits. An assignment can not cover up and preserve the property for the debtor's use, or protect it from the remedies and demands of the creditors." There being no evidence to rebut "the presumption of fraud raised by the law," the mortgage was declared by the court to be void for fraud.

In the case of *Tennessee National Bank v. Ebbert*, 9 Heisk. (Tenn.) 153, a similar mortgage was decided to be void, because it afforded such "facilities for fraud" as to stamp it as "wanting in legal good faith on the plain principle," as was said, that every reasonable man is presumed to intend the probable consequences of his own act. And besides," it was added, "there is clearly a benefit contracted for to the grantors on the face of the deed, and a prejudice to the rights of other creditors."

In *Collins v. Myers*, 16 Ohio, 547, the court declared that "to hold that such a mortgage was valid, would furnish a complete shelter, under which a man could carry on trade for his own benefit, completely protected against the payment of his debts, and placed wholly beyond the reach of creditors." The property was said not be "held by the mortgage, but by the will of the debtor; because if the debtor sees proper to dispose of it, he has the power under the mortgage." For these reasons, such a mortgage on a stock of merchandise was decided to be "void as against the policy of the law."

In Mississippi, such conveyances have been held void, among other reasons, "because of their susceptibility of abuse, by reason of the ease with which they may be employed for wrong purposes, to the injury of creditors."—*Joseph v. Levi*, 58 Miss. 843.

In more than one case they have been held void on the ground that they open a wide door for the easy commission of fraud, and are, therefore, contracts against public policy. *Phelps v. Murray*, 2 Tenn. Ch. 747; *Lund v. Fletcher* (39 Ark. 325), 43 Amer. Rep. 270.

A large number of other adjudications on this subject could be cited, giving forcible reasons in support of the doctrine that a reservation to the mortgagor of a discretionary power of sale renders the mortgage fraudulent as against the creditors of the mortgage debtor. When this fact is made to appear, the better view seems to us to be, that the conveyance is void without regard to the existence of any actual intent to defraud. As forcibly observed by a recent author, "with the enactment of statutes granting a most liberal exemption of personal property, and the abolishment of the laws for the arrest and imprisonment of debtors, a creditor has but a naked claim against the property of his debtor, and it should receive the most ef-

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fective support, and every rule calculated to prevent a debtor from secreting or covering property should be sustained with courage and energy."—Herman on Chat. Mortg. 235.

We are not to be understood as intimating, in this opinion, that a mortgage of merchandise would be rendered conclusively invalid, where the mortgagor is in good faith left in possession of the goods with power to sell for the exclusive use of the mortgagee, holding the proceeds of sale for his benefit. In such case he may well be deemed the mere *agent* of the mortgagee, acting for him and in his behalf.—Mortg. of Merch. (Pierce) §§ 46, 49, 53; *Conkling v. Shelley*, 28 N. Y. 360; *Fisk v. Harshaw*, 45 Wis. 665; *Tickner v. Wiswall*, 9 Ala. 305.

Under the influence of these principles, it needs no further argument to show that the mortgage executed by Crumley Brothers to the Renfro Brothers, on the twenty-fifth day of December, 1878, was fraudulent and void as against the appellants and other creditors of the mortgagors, and that the chancellor erred in not so holding. The decree, dismissing the bill filed by appellants, is reversed, and the cause is hereby remanded, that further proceedings may be had in the chancery court in accordance with the views expressed in this opinion.

## Clark, Adm'r, v. Rose.

### *Bill in Equity to Quiet Title to Land.*

1. *Want of proper pleadings; when may be waived.*—When the court has jurisdiction over the subject-matter, and the necessary parties are before it, by consent, the want of appropriate pleadings may be waived, and questions not presented by the pleadings may be submitted for the consideration and decision of the court; but, in such case, a decree that passes beyond the agreement of the parties, and is without proper pleadings to support it, is erroneous.

#### APPEAL from Greene Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this cause was filed on 16th September, 1879, by Thomas A. Rose against Thomas C. Clark, as the personal representative of the estates of Benjamin T. and George G. Higginbotham, both deceased, and against the heirs of said decedents, and others; and the case made thereby may be stated as follows: On 13th November, 1863, Benjamin T. Higginbotham purchased, at a sale made by one Wilson, as administrator of

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the estate of Thomas C. Jordan, deceased, under the decree of the probate court, designated lands situated in Greene county. At the time of said sale, the said Benjamin T. was the administrator of the estate of George G. Higginbotham, deceased; and he paid for the lands so purchased with funds in his hands belonging to said estate, for which, on a partial settlement made by him of his administration upon said estate, he afterwards obtained credit. No deed, however, was executed by the said Wilson, as administrator of the estate of Thomas C. Jordan, conveying said lands to Benjamin T. Higginbotham, or to any one else. The sale was confirmed, and, upon its confirmation, Benjamin T. Higginbotham took possession of the lands, and continued therein until his death, in 1870. On 20th November, 1876, Thomas C. Clark, as the administrator of the estate of Benjamin T. Higginbotham (which estate had been duly declared insolvent), under a decree of the probate court, sold said lands as the property of said estate, and at the sale the complainant became the purchaser, executing to the administrator his promissory notes for the purchase-money. To the application for the sale of the lands, the heirs of said decedent, who were also the heirs of George G. Higginbotham, were made parties; and, as heirs of the said George G., they employed counsel to resist the application. Afterwards, however, and before the decree of sale was entered, an agreement was made between the administrator and the counsel for the heirs, that a decree for the sale of the lands should be entered, and the lands sold, without objection, and that "the proceeds of said sale should become the subject-matter of litigation and contest between the said parties just as, and to the same extent the said lands and the title thereto, legal or beneficial, would have been, in the absence of said agreement." The terms of this agreement were proclaimed at the sale, and complainant was thereby induced to purchase. The complainant having failed to pay said notes at maturity, the administrator recovered judgment thereon against him in the circuit court of Greene county, at the spring term, 1879. The complainant went into possession of the lands under his purchase, and continues to hold the same. It is averred that the said heirs of George G. Higginbotham, after the recovery of said judgment, refused to abide by, and repudiated said agreement, and threaten legal proceedings to recover the possession of the lands. The prayer of the bill is, that title to the land be made to the complainant, on his paying the purchase-money; or that the sale be set aside and held for naught, and that the collection of said judgment be enjoined; and for general relief.

The complainant having paid the purchase-money into court under a consent decree entered in the cause, and having sold



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and conveyed said lands to James B. Head, an agreement was made between the parties to the cause, on 26th July, 1882, that a decree should be entered, divesting the title to the lands out of the defendants, and vesting it in the said Head; and that "said cause be now submitted to the said chancery court, to determine and decree to whom said money, the proceeds of said land, belongs, and what disposition shall be made of the same, and to make all necessary and proper orders and decrees in relation thereto, upon the pleadings and proof in the cause."

On a submission of the cause on this agreement, and upon the pleadings and proof, the chancellor caused a decree to be entered, the material portions of which, bearing on the points decided, are sufficiently stated in the opinion; and that decree is here made the basis of the assignments of error.

T. W. COLEMAN and T. C. CLARK, for appellant.

W. P. WEBB and ENOCH MORGAN, *contra*.

BRICKELL, C. J.—The material questions decided by the chancellor are, *first*, that the funds used by Benjamin Higginbotham in the purchase of the lands were not his own, but were assets of the estate of George G. Higginbotham, of which he was administrator; invested in the purchase, because of their uncertain, fluctuating value, as the best expedient for making them available to the heirs or next of kin. The *second* is, that the heirs and next of kin have an equity to pursue, and take in lieu of the lands, the moneys derived by the appellant from a sale of them made by him as administrator of Benjamin Higginbotham. It may be conceded to the appellant that there is a want of appropriate pleading presenting this question, and upon which to base a decree granting relief to the heirs and next of kin. The court had, however, jurisdiction over the *subject-matter*, and the necessary parties were before it. The want of pleading the parties could waive, and it was waived by the agreement in which the appellant joined, submitting these questions for the consideration and decision of the court. The consent of parties, express or implied, can not confer jurisdiction; but the element of jurisdiction that consent can not supply, is of *subject-matter*, which must be conferred by law. Whatever pertains merely to bringing the case, the *subject-matter*, before the court having jurisdiction, may be waived, or it may be supplemented by consent of parties.—*Thompson v. Lea*, 28 Ala. 453; *Gager v. Gordon*, 29 Ala. 341. The facts upon which the decree is based are very clearly and satisfactorily shown by the evidence, and so far as the decree is within the scope of the agreement of the parties, the appellant has no cause to complain of it.

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The decree, however, passes beyond the agreement, and, without pleading, assumes jurisdiction of the settlement of the administration of the appellant, as administrator of George G. Higginbotham. A decree without proper pleading to support it, the want of pleading not being waived, is erroneous.—1 Brick. Dig. 743, § 1343; *Flewellen v. Crane*, 58 Ala. 627. In this respect the decree must be reversed and corrected at the costs of the appellee; in all other respects it is affirmed.

## Lee v. Byrne & Trammell.

### *Assumpsit.*

1. *Contract; term "advances" construed.*—Plaintiff and defendants entered into a written contract, whereby the former agreed to deliver to the latter logs at a stated price per thousand feet, and the latter agreed to pay, at the end of each month, for the logs delivered during that month, "after deducting for all *advances*," and commissions thereon at a specified rate. *Held*, that defendants were not entitled to commissions on disbursements made by them from plaintiff's money, or when they were indebted to him for logs delivered under the contract; nor on an old indebtedness owing by the plaintiff, and incurred prior to the execution of the contract.

APPEAL from Mobile Circuit Court.

Tried before Hon. WM. E. CLARKE.

This was an action of assumpsit by W. J. Lea against Byrne & Trammell, in which the plaintiff seeks to recover for certain logs furnished by him to the defendants under a written contract executed by them, in September, 1882, whereby the plaintiff agreed to deliver to the defendants the logs at a specified price per thousand feet. The contract contains this clause: "The said Byrne & Trammell agree to pay the said Lea, at the end of each month, according to the total average, during the month, of each contractor employed by said Lea for all logs delivered, after deducting . . . for all advances made by the said Byrne & Trammell, with ten per cent added, except for groceries, which are five per cent." No other reference to *advances* is made in the contract. It seems that the defendants claimed credit for, among other things, certain commissions on advances alleged to have been made by them to the plaintiff under said contract, and also for commissions on an indebtedness which, they insisted, the plaintiff owed the defendant Byrne on prior dealings of like character, and which had been transferred to Byrne & Trammell.

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The evidence for the plaintiff tended to show that "the defendants had furnished him with supplies while he was getting out logs, with which they charged him; but that the value of the logs furnished by him under said contract was at all times in excess of the amount of supplies furnished him by defendants."

The trial resulted in a verdict and judgment for the plaintiff, but for a less sum than he claimed to be due him; and hence, he appealed. Exceptions were reserved by him to charges given and refused, instructing the jury as to the construction of said contract; and these charges are here assigned as error. It is not deemed necessary to set them out in this report.

CROOM & LEWIS, for appellant.

J. L. & G. L. SMITH, *contra*.

SOMERVILLE, J.—Under the written contract in evidence the plaintiff had obligated himself to deliver a certain quantity of logs to the defendants, at a specified price, for which they were to make monthly settlements. They were authorized to deduct, among other charges, "for all *advances*" made by them to the plaintiff, with a certain percentage of commissions added. By the word "advances," we are to understand money paid before due, or goods sold on credit, by way of accommodation, in expectation of reimbursement. "One who has paid more money, or furnished more goods to another than the latter is entitled to, is said to be in advance to him." If the party proposing to make such advances does so, not out of his own money or goods, but out of the money or goods of the other contracting party, to whom he agrees to advance, he is not entitled to charge commissions as on advances. Such credits become mere payments, to be deducted from the fund due the payee. The contract in question did not, in our opinion, contemplate that commissions were to be charged on such payments, or disbursements, made from plaintiff's money, or made by defendants when they were indebted to the plaintiff.

In ascertaining the matter of indebtedness with the view of estimating the commissions agreed to be charged, the jury were not authorized to take into consideration the indebtedness of the plaintiff to Byrne in the old matter of account between them. The plaintiff appears to have been ignorant of the fact that this had been transferred to the firm of Byrne & Trammell, and it can not, therefore, be considered as within the contemplation of the contracting parties at the time they entered into their written agreement.

The rulings of the circuit court were repugnant to the fore-



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going construction, and were, in our judgment, erroneous. Its judgment must, therefore, be reversed and the cause remanded.

## Wailes & Co. v. Couch.

*Action on the Case to recover Value of Bale of Cotton.*

1. *When lender of money at usurious rate of interest not a bona fide purchaser.*—W. & Co., having sold to L. G. & Co. a bale of cotton, by mistake gave them a delivery order on a warehouseman for it before it was paid for. Afterwards L. G. & Co., without taking actual control of the cotton, and without presenting the delivery order to the warehouseman, paid for the cotton, and then received a second delivery order therefor from W. & Co., they not remembering that they had given the first, and under the second order the cotton was sold by L. G. & Co. and delivered by the warehouseman, who was in ignorance that an older order was outstanding. L. G. & Co. borrowed from C. \$600 on short loan, promising him interest at the rate of one dollar per day, and at the same time, as security for the loan, they delivered to him delivery orders for certain bales of cotton, including the first order given them by W. & Co. L. G. & Co. did not repay to C. the money borrowed, became insolvent, and the collaterals placed in pledge were insufficient to reimburse him, without resorting to the bale of cotton for which W. & Co. delivered the orders. *Held*, in an action on the case by C. against W. & Co. to recover the value of the bale of cotton, that the loan of money made by C. to L. G. & Co. being usurious, C. is not a *bona fide* purchaser for value in that sense which will enable him to triumph over the complete defense which W. & Co. could make, if the suit were by L. G. & Co. (*Saltmarsh v. Tuthill*, 13 Ala. 390, and *Carlisle v. Hill*, 16 Ala. 398, reaffirmed and followed.)

2. *Same; nature of defense.*—The defense, in such case, is not usury, but the improper and unauthorized use which L. G. & Co. made of the delivery order, and usury is invoked merely to preclude C. from claiming the shield of a *bona fide* purchase; and hence, a special plea setting up the usury is not required.

APPEAL from City Court of Selma.

Tried before Hon. JON. HARALSON.

This was a suit by W. H. Couch against Wm. E. Wailes & Co., to recover the value of a bale of cotton, and was commenced on 5th May, 1881. The complaint contains two counts, the first in trover, and the other a special count on the case. The cause was tried without a jury under the provisions of the statute creating said court, the trial resulting in a judgment in favor of the plaintiff, to which the defendants duly excepted. The facts are sufficiently stated in the opinion.

The judgment rendered is here, *inter alia*, assigned as error.

S. W. JOHN and E. W. PETTUS, for appellants.

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W. R. NELSON, *contra*.

STONE, J.—It needs no argument to show that if this suit was by Lotspeich, Gholson & Co., there could be no recovery. The cotton had been delivered pursuant to their order and direction, and they would not be heard to complain that their order had been obeyed. The contention is, that Couch, by virtue of his transaction with them, acquired a better title than theirs, and that would cut off all defenses growing out of the original transaction.

Wailes & Co., by mistake and accident, allowed Lotspeich, Gholson & Co. to obtain a delivery order for the bale of cotton in controversy, before they had paid for it. This authorized them to demand and receive the cotton from the warehouseman, and consequently furnished evidence of ownership in them. They afterwards paid for the cotton, but did not take actual control of it, nor present the delivery order to the warehouseman. When they paid for the bale of cotton, Wailes & Co., not knowing, or not remembering a delivery order for this bale was already in the hands of Lotspeich, Gholson & Co., gave them a second delivery order, and under this the cotton was sold by the latter, and delivered by the warehouseman, still in ignorance that another and older delivery order was outstanding. Lotspeich, Gholson & Co. borrowed from Couch six hundred dollars on short loan, and promised him interest on the loan at the rate of one dollar per day, equal to a fraction over sixty per cent. *per annum*. Contemporaneously with the loan, and as security for its repayment, they delivered to him delivery orders for certain bales of cotton, and among them the order for the bale in controversy. Lotspeich, Gholson & Co. did not repay to Couch the money borrowed, became insolvent, and the collaterals placed in pledge were insufficient to reimburse him, without resorting to the bale of cotton, the value of which is claimed in this suit. Is Couch a purchaser in that sense, which will enable him to triumph over the complete defense Wailes & Co. could make, if this suit were by Lotspeich, Gholson & Co.? This question must be regarded as settled in the negative by the previous decisions of this court.—*Saltmarsh v. Tuthill*, 13 Ala. 390; *Carlisle v. Hill*, 16 Ala. 398. In this last case, in which there was large usury, this court said the holder of the paper (commercial paper) “must be regarded as a usurious holder, and being affected by usury, can not be considered a *bona fide* holder.” Proceeding further, the court said of plaintiff that “not being a *bona fide* holder in the usual course of trade, the defendant could set up any defense, which would have availed him as between the original parties, to defeat the plaintiff’s action.”

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Our decisions above were founded mainly on *Ramsdell v. Morgan*, 16 Wend. 574, and *Keutgen v. Parks*, 2 Sandf. S. C. 60. Those cases were, in effect, overruled in the later New York case of *Williams v. Tilt*, 36 N.Y. 319, 325. On this ground we are asked to reconsider and depart from our former rulings, noted above. *Saltmarsh v. Tuthill* was decided near forty years ago, and has never been questioned in this court. Many rights have, no doubt, been adjudicated on the principles there declared, and they have probably entered largely into commercial dealings. We think they must be treated as establishing a rule of property; and we can not say it is an unhealthy rule. There is much plausibility at least in the dogma, that one who grossly violates the law in the acquisition of property, is not entitled to the protection we accord to one who has innocently and in good faith parted with his money without notice of latent defect in the title he acquires.

It is objected further, that usury is a personal defense which should have been pleaded, and can not be taken advantage of in the form here presented. Usury is not the defense in this action. The defense is the improper and unauthorized use Lotspeich, Gholson & Co. made of the delivery order. Usury is invoked to preclude Couch from claiming the shield of a *bona fide* purchase. It arose on the evidence, and could not arise on the pleadings, in this special action on the case.— *Williams v. Tilt*, *supra*.

The judgment of the city court is reversed, and the cause remanded.

## South & North Alabama Railroad Co. v. Schaufler.

### *Action by Passenger against Railroad Company for Personal Injuries.*

1. *Action against railroad company for personal injuries; variance.* Where, in an action by a passenger against a railroad company, to recover damages for personal injuries, the complaint alleges that the plaintiff "was compelled and forced by the agents of said defendant to get off defendant's train while in motion, and before said train had reached the usual place at the depot," and that injuries sustained by him were produced by the negligence of defendant's agents "in compelling and forcing" him to get off the train, the gravamen of the action is the alleged force, and is not sustained by evidence merely, that, when the train was approaching the platform at the depot, the conductor came towards him in the car, crying out the name of the station, and saying,



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"We have got no time, hurry up," and that this was repeated by the conductor several times while the plaintiff was making his egress from the car, and before he stepped from the moving train; such words not being susceptible of a construction which would impute to the conductor any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it.

2. *Same; contributory negligence.*—A passenger on a railroad train, who, encumbered with hand-baggage, steps from the train on a dark night, while it is moving at the rate of six or eight miles per hour, before it has reached the platform of a regular station, at which he was to get off, and with the locality of which he is acquainted, against the advice of the conductor, and without reason to believe that the train would not stop, as usual, at the platform, is guilty of contributory negligence, which bars him from recovering damages for personal injuries sustained in stepping from the train.

3. *Same; advice or direction of conductor no excuse for plaintiff's negligence.*—Where an adult passenger leaves a moving train under the advice or direction of the conductor in charge of the train, and, in leaving the train, receives personal injuries, it seems to be settled by the authorities, that such advice or direction, though plain and unambiguous, can not be held to excuse an act of negligence on the part of the passenger, which is so opposed to common prudence as to make it an obvious act of recklessness or folly.

4. *Same; whether negligence is excused by advice of conductor, when a question for the jury.*—It seems also to be settled by the authorities, that if, in such case, the act advised to be done is one, in the doing of which the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused.

#### APPEAL from Cullman Circuit Court.

Tried before Hon. LEROY F. BOX.

This was an action by Charles Schaufler against the South & North Alabama Railroad Company, a domestic corporation, to recover damages for personal injuries sustained by him while a passenger on the defendant's train. The defendant's pleas are not set out in the record, but the judgment entry recites that the cause was tried on issues joined on the plea of not guilty and on a "special plea of contributory negligence." The trial resulted in a verdict and judgment for the plaintiff; and from the judgment rendered the defendant took this appeal. The facts disclosed by the evidence, so far as necessary to an understanding of the points decided, are sufficiently stated in the opinion. The first and fifth charges referred to in the opinion, as having been requested by the defendant, and refused by the court, are as follows: 1. "If the jury believe the evidence, they will find for the defendant." 5. "The court charges the jury, that if they believe from the evidence, that the plaintiff, Schaufler, was not forced and compelled to get off defendant's train in any other manner than as testified to by himself, then he can not recover in this action, and they must find for the defendant." The defendant re-

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served exceptions to the refusal to give these charges, and also to several charges given at the plaintiff's request, which the opinion does not render necessary to set out.

The rulings above noted are among the errors here assigned.

THOS. G. JONES and J. M. FALKNER, for appellant. (1) The plaintiff declared upon an injury arising from a jump, which, plaintiff avers in his complaint, defendant's agent *compelled* and *forced* him to take. There was neither actual nor moral force or compulsion; and without this, the injury declared on in the complaint was not made out. It was not necessary for the plaintiff to allege that the injury was caused by force and compulsion, but, having entered into this unnecessary particularity, and the defendant having taken issue thereon, the plaintiff was bound to prove his case as alleged. *Smith v. Causey*, 28 Ala. 655. (2) The general rule is, that where the facts are undisputed, negligence is a pure question of *law* for the court, unless, the facts being admitted, the case is such that reasonable men may properly differ as to the conclusion to be drawn from them, when the court may, and, perhaps, ought to submit the question to the jury. By all the authorities, when facts are such that all reasonable men would be likely to draw from them the same inference, the question is one purely of law for the court, and it is error to submit it to the jury.—*Fernades v. S. R. Co.*, 52 Cal. 45. There are certain acts and omissions which, of themselves, are deemed negligence *per se*; and, when proved, make it the duty of the court to order a nonsuit, or direct a verdict. See *Gonzalez v. N. Y. & H. R. R. Co.*, 38 N. Y. 442; *M. & C. R. R. Co. v. Cope-land*, 61 Ala. 376; *Central R. R. & B. Co. v. Letcher*, 69 Ala. 106; *Gothard v. Ala. Great Southern R. R. Co.*, 67 Ala. 119. Among the acts which, as matter of law, are denounced as negligence *per se*, is the leaving of a car while in motion; and it requires a nonsuit, or the withdrawal of the case from the jury.—*Gavett v. M. & L. R. R. Co.*, 16 Gray (Mass.), 501; *R. & D. R. R. Co. v. Morris*, 31 Gratt. 200; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *O. & M. R. R. Co. v. Schiebe*, 44 Ill. 461; and authorities *supra*. (3) Even if McCants, the conductor, had invited the appellee to get off the train at the time he jumped, it would not excuse the appellee for attempting to do so. The rule is well settled, that, notwithstanding the direction, invitation, or assurance of the servant or agent of the carrier, the plaintiff will not be excused in following it, if the act involves a *known* and reckless exposure of himself, or is one which a man of common prudence would not do.—*P., C. & St. L. R. R. Co. v. Krouse*, 30 Ohio St. 222; *C. B. & Q. R. R. Co. v. Hazzard*, 26 Ill. 385. See also *R. R. Co. v. Aspell*,

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23 Penn. St. 147; *C. & A. R. R. Co. v. Randolph*, 53 Ill. 511. The general charge in favor of the defendant should, therefore, have been given. See also on the defendant's right to this charge, *Improvement Co. v. Munson*, 14 Wall. 442; Whart. on Law of Negligence, § 420; Pierce on Railroads, note 1, p. 312; *Central R. R. & B. Co. v. Letcher*, 69 Ala. 106.

H. L. WATLINGTON, *contra*.—(1) If the action of the conductor was as testified to by the plaintiff, it amounted to gross negligence, nay, wantonness or recklessness; and the plaintiff is entitled to recover.—*Tanner v. L. & N. R. R. Co.*, 60 Ala. 637; *M. & O. R. R. Co. v. Malone*, 46 Ala. 392; *N. & D. R. R. Co. v. Comans*, 45 Ala. 437; *Grant v. Moseley*, 29 Ala. 302; *Hussey v. Peebles*, 53 Ala. 432; 1 Cl. it. on Plead. 129. (2) It is shown by the testimony of the conductor, that his action caused the plaintiff to leave his seat, prepare to leave the car, proceed through the car door, and place himself on the bottom step of the car, a place of great peril and danger; and while the witness may have then made an effort to save the plaintiff, yet, it was through the conductor's recklessness, that these efforts became necessary; and he was bound to do all he could to assist plaintiff, although the plaintiff was in fault. *Phares v. Stewart*, 9 Port. 336; *Grant v. Moseley*, 29 Ala. 302; 45 Mo. 255; 48 Ill. 221; 49 Ill. 490; 38 Ill. 370; 43 Miss. 233; 24 Ga. 75; 27 Ga. 113; 60 Ala. 638; and authorities *supra*. (3) If compulsion existed, contributory negligence can not successfully be invoked.—Wharton's Law of Negligence, §§ 3, 94, 95, 301, 307, 308, 376; *Gov. St. R. R. Co. v. Hanlon*, 53 Ala. 70. The whole doctrine of contributory negligence is, that a plaintiff can not recover for an injury which is more occasioned by, or results from his own negligence, than from the wrong of the defendant.—*Shear. & Red. on Neg.* 481, 485, 487, and authorities there cited. The plaintiff's default or want of care is no defense, if brought about by the action of the defendant.—1 Hill. on Torts, § 170. And the question as to what is ordinary care, must depend upon the circumstances of each case.—1 Hill. on Torts, § 137. (4) Contributory negligence is a matter of defense, and should be pleaded; and the burden of proof rests with the defendant. *S. & M. R. R. Co. v. Shearer*, 58 Ala. 672.

SOMERVILLE, J.—The present suit is one for damages, instituted by the appellee, who was a passenger on the defendant's railroad train, having paid his fare for transportation to Cullman, a station or depot on the line of the road within this State. The averment of the complaint is, that the plaintiff, without any fault of his own, "was compelled and forced by



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the agents of said defendant to get off defendant's train while in motion, and before said train had reached the usual stopping place at said depot," and that the plaintiff's injury was produced by the negligence of defendant's agents "*in compelling and forcing* said plaintiff to get off defendant's train." It is obvious that the whole gravamen of the action is made to lie in the alleged forcible ejection of the plaintiff from the passenger car by the agents or servants of the defendant railroad company. Whether the complaint be regarded, in form, as declaring in trespass or trespass on the case, is immaterial. It is equally unimportant that the averment in question was unnecessary in order to have fixed the liability of the defendant. It was necessary to allege some act of wrong on the part of defendant, or its agents, some act of omission or commission, constituting a *tort*, or breach of legal duty, before a recovery could be had by the plaintiff. This was requisite in order that the defendant might have notice of the nature of the case which he was called on to defend. The plaintiff has elected to state his own ground of action, and if, in doing so, he has stated a particular fact, and, by his mode of statement, has inseparably connected it with the substance of the issue, so as to render proof of it essential, it is a misfortune of his own, which can not be justly visited upon his adversary.

We fail to discover in the record any evidence tending to support this averment of the complaint. There is no fact stated which tends to prove that the plaintiff was compelled or forced in any manner by defendant's agents, or by any one else, to leave the train. The only part of the evidence which is invoked in argument, as giving any color of support to this view of the case, is the statement, testified to by the plaintiff himself, that when the passenger train was approaching the platform at the station, the conductor came towards him in the car, where he was seated, crying out the name of the station and saying, "*We have got no time, hurry up!*" and that this ejaculation was repeated several times while the plaintiff was making his egress from the car and before he stepped from the moving train a few minutes afterwards, thus receiving his injury. It is not only proper, but it becomes necessary for us to say that these words, alleged to have been used by the conductor, are not susceptible of a construction which would impute to him any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it. There was, for this reason; a material disagreement between the allegation of the complaint and the proof, which constituted a fatal variance. The substance of the issue, as made by the pleadings, is unsupported by any evidence found in the record. The court erred, there-

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fore, in refusing to give the first and fifth charges requested by the defendant, which properly raise this feature of variance. The several charges also given at the request of the plaintiff, which seem to have been based upon the supposed existence of any force, compulsion, or terror exercised by the conductor upon the plaintiff, were clearly misleading, and should not have been given.

In view of the errors above stated, the judgment of the circuit court must be reversed, and the cause remanded. We proceed to state a few principles, pertinent to the rulings of the court as found in this record, which may serve to facilitate the promotion of justice, and for the guidance of the court and jury upon another trial.

It is plain that the first inquiry must be as to whether the agents of the defendant have been guilty of any tort, wrongful act, or negligence, which has resulted in producing the injury received by the plaintiff. If there has been no wrongful act of omission or commission, such as constitutes a violation of legal duty on the part of the defendant, or its agents who were in charge of the train at the time of the accident, no recovery of damages by the plaintiff can be had, whatever may be the extent of his injury. So, if it be shown that the defendant, or its servants were guilty of such wrongful act, but that this act had no legal connection with the injury received, so as to have operated to produce it as a natural and proximate consequence, there is no liability cast on the defendant, and this must be an end of the case.

If, however, it is ascertained that the defendant or its servants have been guilty of some wrong or negligence, the question then is: (1) Whether the damage complained of was occasioned entirely by the negligence or wrongful act of the defendant, or such servants; or (2) whether the plaintiff, by his own negligence, or want of ordinary care and prudence, has so far contributed to his own misfortune, that, but for such contributory negligence on his part, the misfortune or injury complained of as the basis of his action would not have happened.—*Ala Gr. S. Railroad Co. v. Hawk*, 72 Ala. 112, and cases cited; *Railroad Co. v. Jones*, 95 U. S. 439. In the first contingency the plaintiff may be entitled to recover, but in the second he is not.

In considering the question of contributory negligence on the part of the plaintiff, it is competent for the jury to consider what was said by the conductor at or about the time of the accident. If the testimony of the conductor, McCants, be taken as true—which seems to be fully corroborated by Johnson, the conductor of the sleeping car—asserting that he told the plaintiff to “hold up, the train was going to stop,” it is quite apparent that the injury received by the plaintiff was the

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result of his own want of prudence and caution, without which it could not have happened, and that he would be barred of a recovery. The law would not tolerate that a passenger, who was encumbered with articles of hand-baggage, should prematurely step from a train of moving cars in the darkness of night, while running at the speed of six or eight miles per hour, against the advice of the conductor in charge, when he had no reason to believe that the train would not stop as usual at the platform of a regular station, with the locality of which he is shown to have been acquainted. This would be an act of carelessness by which he himself might clearly be adjudged to be the author of his own injury.—*Shear. & Red. Negl.* §§ 281, 283; *Central Railroad, etc., Co. v. Letcher*, 69 Ala. 106; *Ala. Gr. Sr. R. R. Co. v. Hawk*, 72 Ala. 112; *Gothard v. Ala. Gr. So. R. R. Co.*, 67 Ala. 114.

The plaintiff, however, denies that he was warned by the conductor to hold up, or not to jump, but that the language used by him was to "hurry up, we have no time," or words of this import. This conflict in the evidence is not to be dealt with by this court, but is to be resolved by the jury upon the usual principles by which the credibility of witnesses should be determined. We have no right to assume that they will not do this upon their consciences as upright men, free from the influence of every prejudice, as it will be their sworn duty to do. If, in the discharge of this duty, they can justly arrive at the conclusion that the statement of the plaintiff on this point should be believed, rather than that of the two other witnesses, by whom he is contradicted, the question will arise as to what effect the language used by the conductor will operate to excuse the conduct of the plaintiff, so as to exempt him from the imputation of contributory negligence. If the conductor told the plaintiff to "hurry up, we have no time," would this excuse the premature egress of plaintiff from the passenger car, in a manner which would have been an act of inexcusable negligence without such direction or declaration by the conductor?

There are numerous cases where the question has been considered as to the effect of *advice* or *directions* given to passengers by conductors, or others in the management of vehicles and railroad trains. Two propositions seem to be settled by the authorities, which may be stated as follows: *First*, such advice, even though plain and unambiguous, can not be held to excuse an act of negligence on the part of an adult passenger, which would be so opposed to common prudence as to make it an obvious act of recklessness or folly.—*Railroad Co. v. Jones*, 95 U. S. 439; *Shear. & Red. Negl.* § 282. *Second*, where the act advised to be done is one where the danger would not be



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apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused.—*Lambeth v. N. C. Railroad Co.*, 66 N. C. 494; *Cleveland, etc., R. R. Co. v. Manson*, 30 Ohio St. 451; *McIntyre v. N. Y. Cen. R. R. Co.*, 37 N. Y. 287; *Penn. Railroad Co. v. McCloskey*, 23 Penn. St. 526; *Woods' Fields' Corp.* (2nd Ed.) § 497, p. 756, *note*.

We can not know under which of these principles the case may be made to fall by the evidence introduced on another trial. We do not seek, therefore, to make any application of them in detail. This we leave to the wisdom of the court below, without further discussion.

Reversed and remanded.

## Lake & Marshall v. Gaines & Co.

*Action by Landlord against Purchaser from Tenant of Crop grown on Rented Lands.*

1. *Error not presumed, but must be shown.*—On appeal, error can not be presumed, but must be affirmatively shown; and hence, an exception reserved to the action of the primary court in overruling a motion to strike an amended complaint from the file, must be disallowed, when the record contains only one count, and it does not appear whether it is the original or an amended complaint.

2. *Admissibility of evidence; when error not shown.*—When evidence, on its face irrelevant, is offered, and to its admissibility objection is made, if any connecting facts can be shown, rendering it relevant, the party offering it should inform the court of the manner in which he proposes to connect it so as to show its relevancy; and if the record, on appeal, fails to show that this was done, an exception to the ruling of the primary court sustaining the objection, will be disallowed.

3. *Same; when exception can not be considered.*—Where objection is sustained to offered evidence, partly legal, and partly illegal, and the record fails to show whether the objection was to the whole, or only to a part, and if to a part, what part, an exception to the ruling of the primary court sustaining the objection can not, in this condition of the record, be considered.

4. *Lien of landlord on tenant's crop; right of recovery against stranger receiving and disposing of crop; application of payments.*—During 1879, G., who was engaged in merchandising, rented to S. for the year a plantation owned by him, and, as landlord, made advances to him, on which, at the end of the year, there was a small balance unpaid. On 1st January, 1881, V. became a part owner and tenant in common with G. in the plantation, and S. renewed and continued his lease for that year, and G. continued to advance to him until March of that year, when V. became a partner with him in merchandising, and, under the firm name of

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G. & Co., they continued to advance to S. as their tenant; and the same relation was continued through the year 1881, and during that year some advances were also made. At the time the partnership was formed between G. and V., the former transferred to the partnership the claim on S. for advances. In March, 1880, when the partnership was formed, the amount due from S. to G. for advances, including the unpaid balance for 1879, amounted to \$117; and, at the end of 1880, the amount due for advances was \$490, when S. made a payment reducing it to \$216, which was, during 1881, increased by advances made during that year. In the spring of 1881, S. made arrangements with L. & M., merchants, for advances, and gave them, as security, a crop-lien note and also a mortgage on the crop, which were duly recorded; and during that year, he obtained from them between \$400 and \$500 in advances; and in latter part of the year, they received nine bales of cotton grown on said plantation, sold it, and applied the proceeds to their claim against S. At the time L. & M. agreed to advance to S., they knew he was the tenant of V. & G., and when they received the cotton, they knew it had been grown on said plantation, and that G. & Co. claimed a lien on it for advances made as landlords. *Held*, in an action by G. & Co. against L. & M.,

(a) That plaintiffs were entitled to recover the amount of S.'s debt to them for the advances made to him, with interest thereon, not to exceed the amount L. & M. realized from the sale of the cotton received by them, with interest thereon.

(b) *Quære*—If any question arises as to the right to recover for the advances made before the partnership was formed between G. and V., must not that portion of the account be considered as paid and eliminated from the suit, under the principle declared in *Lee v. Tannenbaum*, 62 Ala. 591, and *Lewis v. Dillard*, 66 Ala. 1?

5. *Same; nature of.*—The statute giving to a landlord a lien on his tenant's crop for advances is paramount to, and much more comprehensive than the lien a stranger may contract for under the crop-lien law; the court declaring that it is "very difficult to define, as matter of law, what articles of commerce are beyond the pale of the very comprehensive words" contained in the statute.

## APPEAL from Mobile Circuit Court.

Tried before Hon. WM. E. CLARKE.

The nature of the action, and the material facts disclosed by the evidence are stated in the opinion. It may be added, however, that an itemized statement of the advances obtained by the tenant, Scott, from the plaintiffs, is made an exhibit to the bill of exceptions, from which it appears that the principal items were for provisions, dry goods, teams and farming implements; there were also charges for tobacco, whiskey and snuff. The evidence tended to show that the cotton received from Scott by the defendants was worth "from \$45 to \$50 per bale;" and that the defendants received, as the net proceeds from the sale thereof, \$401.11, which was insufficient to pay what Scott owed them. The bill of exceptions purports to set out all the evidence.

The court charged the jury, at the plaintiffs' written request, that if they "believe the evidence, they must find for the plaintiffs, and assess the damages at the amount they find,

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from the evidence, Scott's debt to Gaines & Co. for advances to have been, with interest on the same; but, in no event, to exceed the proceeds of the sale of the cotton, with interest thereon from the time it was sold by defendants." To this charge the defendants excepted; and they requested the following charge in writing, which was given: "The jury, in ascertaining what is the indebtedness of Scott to plaintiffs, for which they had a lien, may look to all the evidence in the case; and they can strike out any items which the proof does not show were for the sustenance or well-being of the tenant or his family, for preparing the ground for cultivation, [and for] cultivating, gathering, saving, handling, or preparing the crop for market." The trial resulted in a verdict and judgment in favor of the plaintiffs for \$410.57.

The charge given at plaintiffs' request, and the rulings on the pleadings and evidence, noted in the opinion, are among the assignments of error here made.

JAMES COBBS, for appellants.

TOULMIN, TAYLOR & PRINCE and PILLANS, TORREY & HANAW, *contra*.

STONE, J.—There was a motion in the circuit court to strike the amended complaint from the file, and an exception to the action of the court in overruling the motion. We find but one count of a complaint in the transcript, and can not tell whether it is an original or an amended count. This exception must be disallowed, because there is nothing in the record by which we can determine whether or not there was error in the ruling. Error can not be presumed, but must be affirmatively shown.—*Mc Williams v. Phillips*, 71 Ala. 80.

Gaines, one of the plaintiffs, being examined as a witness, was asked on cross-examination, "If he had not, since this suit was brought, received from Abe Lassiter \$20.70, which he had not paid over to Mr. Lake." This was objected to, and ruled out. What relation this had, or could have to the case is not shown. Without stating any further objection to the testimony the question tended to elicit, it is enough that the record nowhere shows Lake was entitled to the money, or that Gaines was under any obligation to pay it out to any one. If any connecting facts could have been shown, which would have rendered the testimony relevant, the defendant, when the objection was made, should have informed the court in what manner he proposed to connect the testimony, so as to show its relevancy.—1 Brick. Dig. 809, §§ 83, 84. And if the connecting testimony is not afterwards introduced, then the testi-



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mony thus received should be ruled out, on motion of the opposite party.

There was objection sustained to testimony proposed to be given by Lake as a witness, the extent of which we can not understand. We can not know whether the rejection and exception related to the whole of the testimony previously stated, or only to a part; and if a part, to what part. Some of the mass of his testimony was legal, and some illegal. Pritchett's threat to seize two bales of the cotton was clearly illegal, and other portions of the evidence were irrelevant. In the state of this record, we can not pass on this question.—1 Brick. Dig. 247, §§ 72, 73.

The only remaining question relates to the charge of the court, which was given at the written request of plaintiffs. Submitting the question of the credibility of the witnesses to the jury, this charge pronounced on the legal effect of the evidence.

During the year 1879, H. L. Gaines, using the name of H. L. Gaines & Co., was engaged in merchandising, and also owned a plantation, of which one Scott became tenant for that year. Gaines made advances to Scott as his tenant, and at the end of the year, after paying the rent, there was a small unpaid balance of the debt for advances. On the 1st January, 1880, one V. P. Gaines became part owner, or tenant in common with H. L. Gaines in said plantation, and Scott renewed and continued his lease for that year, and H. L. Gaines continued to advance to him as tenant. In March, 1880, V. P. Gaines became a partner in the mercantile establishment, and it continued business in the firm name of H. L. Gaines & Co., and continued to advance to Scott as their tenant. The same relation was continued through the year 1881, and some advances were made during that year. At the time the new mercantile firm was formed in March, 1880, the old firm, consisting of H. L. Gaines alone, transferred the claim on Scott for advances to the new firm, consisting of H. L. and V. P. Gaines, who are the plaintiffs in this action. There was a small balance due for advances, as we have said, for the year 1879, and there were advances made by Gaines between the 1st of January, 1880, and March of that year, when V. P. Gaines became a partner. The advances made during this interval were probably a fraction over one hundred dollars. Including the small balance due for advances in 1879, the amount for advances March, 1st, 1880, when V. P. Gaines became a partner, is claimed to have been one hundred and seventeen dollars; and such is the tendency of the testimony. At the end of the year 1880, the account for advances, as the testimony tends to show, was four hundred and ninety dollars. Three was then paid by Scott, by sale of cotton, something over two

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hundred and seventy dollars, leaving an unpaid balance of two hundred and sixteen dollars. There were also items of charge for the year 1881, swelling the account to the sum sued for.

In the spring of the year 1881, Scott made arrangement with Lake & Marshall to make him advances that year, to enable him to make a crop; and gave them a crop-lien note, and mortgage on his crop, to secure payment for such advances. These papers were duly acknowledged and recorded. He obtained from them between four and five hundred dollars in advances, under this contract. At the time Lake & Marshall entered into the contract to advance, they knew Scott was tenant on the lands of plaintiffs; and when they received the cotton after mentioned, they knew it had been grown in 1881, by Scott, on lands rented from Gaines & Co., and that Gaines & Co. claimed a lien on it for advances made as landlords. They received nine bales of the cotton so grown, sold it, and applied the proceeds to their claim against Scott. This suit was instituted by Gaines & Co. to recover so much of the proceeds of the cotton as was necessary to pay them for the balance of the advances made by them.

The statute giving to a landlord a lien on the crop of his tenant for advances, is paramount to, and much more comprehensive than the lien a stranger may contract for, under what is known as the crop-lien law.—Code of 1876, §§ 3467, 3286. Under the section last cited, a lien, to be effective, must be declared in writing and recorded, and can only be created and enforced, for “advances in horses, mules, oxen, necessary provisions and farming tools, or money to purchase the same.” Beyond articles falling within these enumerated classes, a stranger to the contract of letting can acquire no valid crop-lien save by mortgage. Not so with the landlord. He requires no written declaration of lien, but the sum is secured to him by law, as an incident to the letting. In addition to the rent for the current year, he has a lien “for advances made in money or other thing of value, whether made directly by him, or at his instance and request by any other person, or for which he has assumed the legal responsibility at or before the time at which such advances were made, for the sustenance or well being of the tenant or his family, for preparing the ground for cultivation, or for cultivating, gathering, saving, handling, or preparing the crop for market.” These are certainly very comprehensive words, and we would find it very difficult to define, as matter of law, what articles of commerce are beyond the pale of these comprehensive words. We will not now undertake to draw the line. So, if the advances are not paid for in the current year, the residuum becomes a lien on the next crop, if the tenancy continues; and the landlord may assign his

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claim, with all its liens and remedies, to another.—Code, §§ 3469, 3470.

It would seem that the articles which go to make up plaintiff's claim, on which they base their right to recover the proceeds of the cotton, are, none of them, shown to be outside of the provisions of the statute; and hence, if the testimony was believed, plaintiffs were entitled to recover the amount of Scott's debt to them for the advances made to him, with interest thereon, not to exceed the amount Lake & Marshall realized from the sale of the cotton, with interest thereon. And if any question arises as to the right to recover for the goods advanced before March 1st, 1880, must not that portion of the account be considered as paid, and eliminated from this suit, under the principle declared in *Lee v. Tannenbaum*, 62 Ala. 501, and *Lewis v. Dillard*, 66 Ala. 1?

We find no error in the record, and the judgment of the circuit court must be affirmed.

## Gusdorf & Co. v. Ikelheimer & Co.

*Bill in Equity by Attaching Creditor to compel prior Judgment Creditor with Execution to exhaust Collaterals held by him, before resorting to Funds in Hands of Sheriff.*

1. *Marshaling securities; right of attaching creditor to compel prior execution creditor to exhaust collaterals, before resorting to funds in the sheriff's hands.*—A judgment creditor, with an execution levied on personal property of value sufficient to satisfy his judgment, having received from his debtor, as collateral security, certain choses in action, which were collected by him before sale by the sheriff of the property on which the execution was levied, will be compelled by a court of equity, on a bill filed for that purpose by an attaching creditor, whose attachment was subsequently levied on the same property, and who has reduced his demand to judgment, to apply the money realized from the collaterals in satisfaction of his execution, thereby exonerating the proceeds of the sale of the property levied on, to that extent, from liability to the execution, for the benefit of the attaching creditor, and for the satisfaction of his junior lien.

2. *Same; collection realized from collaterals a payment pro tanto of judgment.*—The sum realized by collection from the collaterals, in such case, having been collected before satisfaction was obtained through the medium of the execution, was immediately applied, by operation of law, to the satisfaction of the judgment, to enforce which the execution was issued, extinguishing it *pro tanto*.

3. *Same; right of attaching creditor not affected by subsequent agreement between judgment creditor and debtor.*—An agreement between the plaintiff and defendant in execution, made after the attachment was levied, and notice thereof had been given to them, to the effect that the



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money realized from the collaterals should only be applied to the payment of any balance of the judgment remaining unsatisfied by the sale under execution, can not impair or affect the right of the attaching creditor to have the two funds thus marshaled for his benefit.

4. *Same; fund realized from the collaterals can not be garnished in hands of judgment creditor.*—The money realized from the collaterals having been immediately applied, by operation of law, to the satisfaction of the judgment of the creditor holding them, other creditors can not, by garnishments subsequently served on him, intercept the money, or prevent the first attaching creditor from enforcing its application to the satisfaction of the execution.

5. *Same; jurisdiction of court of equity not affected by summary remedy in court of law.*—The summary jurisdiction which the court of law may exercise over the sheriff and the parties to the execution and attachment issuing from it, in determining between the rival claimants the priorities of their legal liens, and in controlling and compelling the proper application of the money collected, if it extends to such case, does not take away the jurisdiction of a court of equity to marshal the securities so as to adjust the equitable rights of the rival claimants.

APPEAL from City Court of Selma.

Heard before Hon. JON. HARALSON.

This was a bill in equity, exhibited by E. Ikelheimer & Co. against M. Gusdorf & Co., S. Lehman, Hellman & Herman and Keifer Bros.; and was filed on 15th June, 1882. The purpose of the bill, and most of the material facts disclosed by the record are stated in the opinion, rendering necessary only a brief supplemental statement in this report. Hellman & Herman and Keifer Bros. sued out attachments against the defendant Lehman, which were levied on the personal property on which the execution in favor of Gusdorf & Co. was levied, and were "further levied" by summoning Gusdorf & Co. to answer as garnishees and debtors to Lehman. These attachments were subsequent to the attachment sued out against Lehman by the complainants. No garnishment, however, was issued on the attachment sued out by the complainants. All of said proceedings were in the City Court of Selma, on the law side thereof. Lehman made no defense; and Gusdorf & Co. made no claim to the fund realized from the collaterals held by them; they admitting that they were stakeholders, and expressing a willingness to account, as such, for the fund to those entitled thereto. Hellman & Herman and Keifer Bros. separately demurred to the bill, assigning numerous grounds. The court having overruled the demurrers, they separately answered. The grounds of defense relied on by them on their demurrers and in their answers are sufficiently indicated in the opinion.

On the hearing, had on the pleadings and proof, a decree was entered, granting relief to the complainants; and from that decree this appeal was prosecuted. The final decree and

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the decree overruling the demurrers to the bill are here made the basis of the assignments of error.

WM. C. WARD, for appellants. (1) "The remedy by attachment is a special statutory remedy—it is in derogation of the common law; and in resorting to it, and deriving rights from it, the statute must be pursued. If from any cause the remedy it affords is not full and complete, a court of equity can not cure the deficiency."—*Phillips v. Ash*, 63 Ala. p. 418; *Drake* on Att. § 4 a, citing *McPherson v. Snowden*, 19 Md. 233. See also *Janney v. Buell*, 55 Ala. 408; *Story's Eq. Jur.* § 61; *Sedg. on Stat. & Con. Law*, 343. The levy of the attachment "from its date creates a lien, a right to charge the property levied upon with the payment of the judgment, in priority of any subsequent alienations the defendant may make, or of any subsequent incumbrances he may create, or of subsequent liens arising by operation of law in favor of other creditors." The right is given to charge the particular property levied upon; and neither directly nor indirectly can this right be extended to reach property not levied upon.—*Phillips v. Ash*, *supra*. (2) Equity will not aid an attaching creditor to marshal assets of the debtor. This point elaborately discussed, with citation of following authorities, *arguendo*: *Shedd v. Bank of Brattleboro*, 32 Vt. p. 709; *Westmoreland v. Foster*, 60 Ala. 448; 1 *Story's Eq. Jur.* (12th Ed.) § 634 a and note. The gravamen of the bill amounts to this: Gusdorf & Co. have a prior lien on the stock of goods by their execution. They also have other security, to-wit, the collaterals; but Ikelheimer & Co. have a junior lien also on the stock of goods, but not on the collaterals. Therefore, equity will compel Gusdorf & Co. to exhaust the collaterals before deriving any benefit from the sale of the goods. In this way, Hellman & Herman and Keifer Bros. must be displaced altogether, to let the complainants in, although they, by their attachments, have, as to the collaterals, a junior lien to Gusdorf & Co. Thus the court undertakes, between *rival* attaching creditors, in a race of diligence, to marshal assets, and to take from one what he has captured, and bestow it upon another. (3) The appellees had notice that Gusdorf & Co. held, and were collecting the collaterals before the property seized was sold. By timely notice to the sheriff, he could have been compelled to pay the proceeds of the sale into the law court, or to pay the same out under orders of the court; and appellees' right to this fund could have been settled.—44 Ala. 554. But having let this opportunity pass, appellees lost their chance at law against the sheriff. They can now have no remedy against Gusdorf & Co.—*Kelly v. McCaw*, 29 Ala. 227. But see 29 Am. Dec. p. 582. (4) Although a

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lien creditor has the right to the aid of a court of equity to compel a prior lien creditor, having other security, to exhaust that other security first, yet, when he waits until the prior lien has appropriated the common security, he is without remedy in a court of equity. He is too late.—1 Story's Eq. §§ 633, 642; 28 Am. Dec. p. 622; 29 Am. Dec. p. 582, and authorities cited; 6 Ohio, 163; 13 Ohio, 197. "The right to marshal will never be applied to the detriment of either claimant, or of the person against whom the claim lies."—1 Story's Eq. §§ 559-60; *McArthur v. Martin*, 23 Minn. 74; *Marr v. Lewis*, 31 Ark. 203; *Taylor's appeal*, 81 Pa. St. 460.

WHITE & WHITE, *contra*.—(1) When complainants' attachment was levied on the goods of Lehman, it became and was a lien from *that time* on the same, subject alone to the prior lien in favor of Gusdorf & Co. for the payment of their judgment. Code, 1876, § 3280. This lien could not be divested by the levy of a subsequent attachment or garnishment.—1 Brick. Dig., p. 162, § 105; *Johnson v. Burnett*, 12 Ala. 743. (2) Gusdorf & Co. having received \$743.40 on choses in action which were held as collateral to their judgment, before the sale by the sheriff, the law applied said sum immediately to the payment of the judgment.—*Webster v. Singley*, 53 Ala. 208; *Hunt v. Nevers*, 15 Pick. 500; *Dismukes v. Wright*, 3 Dev. & Bat. (N. C.) 78; *Ware v. Russell*, 57 Ala. 43. It follows that, in not crediting the judgment with said sum, Gusdorf & Co. received that much more of the proceeds of the sheriff's sale than they were entitled to, and which belonged and should have been paid to the complainants. This is just as true as if Lehman had paid Gusdorf & Co. that much money on the judgment before they received any thing from the sheriff. (3) When said sum was realized by Gusdorf & Co. out of these collaterals, it was their duty to the complainant to apply it to the satisfaction of their judgment; and a court of equity, considering as done that which they ought to have done, will compel them to account to the complainants for the surplus, after their debt has been fully satisfied. They had no right or power over this fund, except to apply it to the payment of the judgment for which they held it in trust; and they could not decline to execute that trust to the prejudice of complainants.—*Schiffer v. Feagin*, 51 Ala. 337; *Hicks v. Bingham*, 11 Mass. 300; *Toomer v. Randolph*, 60 Ala. 360; *Sanders v. Knox*, 57 Ala. 81; *Donald v. Hewitt*, 33 Ala. 548. The parties being before the court, and the fund being in possession of Gusdorf & Co., equity will lay its hands upon it, and enforce the *lien* and right of the complainants, especially as this can be done without prejudice or injury to Gusdorf & Co.



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The complainants did not lose their right to this money because Gusdorf & Co. wrongfully received it from the sheriff.

*Westmoreland v. Foster*, 60 Ala. 455; *Cawthorn v. McCraw*, 9 Ala. 519; *Abraham v. Hall*, 59 Ala. 391. (4) The complainants' right to this fund is not a legal claim on which they could have sued at law. It was neither *jus in re* nor *jus ad rem*; but a mere lien, a right to have it applied to the payment of their debt, which, under the authorities cited *supra*, could only be enforced in equity. Complainants can no more maintain an action at law for this money than they could have maintained detinue or trover for the goods, if they had gone into the hands of Gusdorf & Co. after the levy and before the sale. *Webster v. Singley*, *supra*, and *Hurt v. Redd*, 64 Ala. 87, distinguished. The sheriff having paid the money over, in obedience to the mandate of the execution, complainants' remedy at law against him is gone, and it remains only for a court of equity to follow up the fund and to enforce complainants' lien upon it.—*Crenshaw v. Harrison*, 8 Ala. 342; *Patton v. Hamner*, 28 Ala. 618; *Mason v. Watts*, 7 Ala. 703. Even if an action at law would lie, this is one of those cases of trust, a claim to equitable relief, which will support a bill in equity.—*Price v. Pickett*, 21 Ala. 743; 60 Ala. 455. (5) We cite the following authorities to show complainants' right to the money in controversy, and that, if they had the legal title and not a mere lien, they could have brought *assumpsit* for it.—*Sherrod v. Hampton*, 25 Ala. 652; *Knox v. Abercrombie*, 11 Ala. 997; *Chenault v. Walker*, 22 Ala. 275. (6) The subsequent agreement between Lehman and Gusdorf & Co. as to the application of the funds realized from the collaterals, was a fraud on complainants' rights.—2 Watts, 228; 53 Ala. 211; 27 Am. Dec. 301, 305-6; 11 Am. Dec. 795. It became and was the legal duty and obligation which Gusdorf & Co. owed the complainants, to preserve the security afforded by the collaterals, on which the complainants had no lien; and if they failed to do so, they must account for the resulting injury.—*Cheesebrough v. Millard*, 1 Johns. Ch. 409, 412-13; *Gordon v. Bell*, 50 Ala. 213; 2 Am. Lead. Cases, 261-2; *Dorr v. Shaw*, 4 Johns. Ch. 17; *Henderson v. Huey*, 45 Ala. 275. The rights of the complainants were not affected by said agreement. This point discussed at length. (7) The position that a court of equity will not marshal assets except in favor of a party holding a *contract* lien, is not sound. The remedy lies in favor of a judgment creditor.—*Dorr v. Shaw*, 4 Johns. Ch. 17; 1 Story's Eq. Jur. 634. And an attaching creditor can file a creditor's bill.—13 Cal. 626; 16 N. J. Eq. 300; 6 Cal. 376; 13 Cal. 76; 4 Sandf. Ch. 565.

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BRICKELL, C. J.—The appellants, Gusdorf & Co., were judgment creditors of Solomon Lehman, and caused an execution issuing upon their judgment to be levied upon personal property of value sufficient to satisfy it. At the time of the judgment and levy, they had also choses in action transferred to them by the judgment debtor, as collateral security for their debt. The appellees were general creditors of Lehman, and, on the day succeeding the levy of the execution, they caused an attachment to issue, which was levied upon the same personal property on which the execution was levied. The attachment suit was duly and successfully prosecuted to judgment in favor of the appellees. The personal property was, or the proceeds of sales were more than sufficient to satisfy the execution of Gusdorf & Co., and were by the sheriff applied to its satisfaction. Before this application of the proceeds of sales was made, Gusdorf & Co. had made collection of the collaterals to the amount, as alleged in the original bill, of seven hundred and forty-three 41-100 dollars, which yet remains in their hands; and the purpose of the original bill is to compel them to apply that sum in satisfaction of their execution, exonerating the proceeds of the sales of the property to that extent from liability to the execution, for the benefit of the appellees, and the satisfaction of their junior lien. This, of course, involves a decree compelling them to pay that sum to the appellees. The equities of the appellees and of Gusdorf & Co., upon this state of facts, we first propose to consider.

The general principle, upon which the equity of the bill is founded, is, that if one creditor has a lien upon, or interest in, or the security of two funds for a debt, and another creditor of the same debtor has a lien upon, or interest in, or the security of one only of the funds for another debt, the latter has the right in equity and good conscience to compel the former first to resort for satisfaction to the fund on which he alone has the lien, interest, or security, if that course is necessary for the satisfaction of both debts, whenever it will not trench upon his rights, or operate to his prejudice.—1 Story's Eq. Jur. § 633; *Nelson v. Dunn*, 15 Ala. 501; *Chapman v. Hamilton*, 19 Ala. 121. "The nature of the property which constitutes the double fund does not affect the operation of the principle; and it applies whenever a paramount creditor holds collateral security, or can resort collaterally to other real or personal property for the satisfaction of the debt."—2 Lead. Eq. Cases (Part 1), 262. In *DePeyster v. Hildreth*, 2 Barb. Ch. 109, a creditor had a judgment which was a lien upon real estate, and upon which execution had issued and was levied upon personal property sufficient for the payment of the judgment; and it was held, he was bound to exhaust the levy, in exoneration of the real estate for

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the relief of mortgagees taking a mortgage subsequently to the judgment. And in *Ingalls v. Morgan*, 6 Selden (10 N. Y.), 178, a judgment creditor having a lien on real estate which was sold by the debtor, and notes for the purchase-money taken and transferred to the creditor, it was held he was bound to collect and apply the notes in satisfaction of the judgment. Without losing all recourse upon the lands in the hands of a subsequent purchaser, he could not surrender the notes to the debtor from whom he received them. The court said: "The facts present a case where the creditor has a lien upon two funds for the security of his debt, and another party has an interest in one only of these funds, without any right to resort to the other. In such a case, equity will compel the creditor to take his satisfaction out of the fund upon which he alone has an interest, so that both parties may, if possible, escape without injury." There are numerous cases to be found in the books in which a court of equity has intervened and applied this doctrine, without inquiry or distinction whether the property constituting the two funds or securities was of the same nature; whether the one was real, and the other personal; or, if both were personal, whether the one was visible, tangible, capable of actual possession, and the other a *chose* resting in action. The distinction can only be made, when a necessity for it may be shown to exist, to prevent the operation of the principle from working to the prejudice of the paramount creditor.—*Goss v. Lester*, 1 Wisconsin 51. The whole foundation of the principle, it is said, is the natural equity and benevolence which requires every one to exercise his rights, so far as he can without inconvenience to himself, in a way that will avoid causing loss to others.—1 Story's Eq. Jur. § 633.

An attachment is a statutory process; and its purpose is, that the jurisdiction of the court, in the ulterior proceedings, may be the more effectual, and that, security for the judgment obtained may be afforded to the plaintiff. From the day it is made, the levy creates a lien, taking precedence of all subsequent alienations, or of subsequent incumbrances, made or created by the debtor, and of subsequent liens acquired by other creditors by the operation of law, or of legal process. The lien, it is true, is, primarily, incipient, inchoate, and conditional, operating only on the particular property which is the subject of the levy, and will be defeated if judgment is not obtained, upon which process can issue for the subjection of the property to sale. And it is, of consequence, as is insisted by counsel, less stringent, frailer, and more uncertain than the lien of an execution.—*Phillips v. Ash*, 63 Ala. 414. But that the lien is of statutory derivation, and the mode of its enforcement is prescribed by statute, is not of itself an objection



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to compelling a creditor having prior liens so to use them, that the attaching creditor, after he has obtained judgment, shall not be defeated. Real estate is by statute subjected to the satisfaction of legal process, and liens of judgments or executions operating upon it are derived wholly from statutes declaring them. A court of equity, in this country, does not more often exercise its jurisdiction to marshal assets, and in the exercise of the jurisdiction compelling creditors or others to exhaust funds or securities to which they alone can resort, than in the exoneration of lands for the benefit of creditors having liens upon them by judgment, or by execution derived from statute. The existence of the jurisdiction, and the propriety of its exercise, have not been questioned. A mechanic's lien is the creature of statute, and yet, in the application of this doctrine, it has been regarded as standing upon equal ground with a mortgage, affecting to the same extent legal and equitable rights.—*Hamilton v. Schwehr*, 34 Md. 108; *Kenny v. Gage*, 33 Vt. 302. Whether the court would intervene to marshal assets, and to apply this doctrine, at the instance of an attaching creditor, before he had by judgment perfected the lien of the attachment; or whether, in such case, intervention would not be limited to a preservation of things and of the rights of the parties *in statu quo*, if it could be done without injustice to the prior creditor, is not a question now arising. The appellees had perfected their lien by judgment before exhibiting the bill. The prior creditors had notice of the levy of the attachment, and, so far as they could without inconvenience to themselves, or without trenching upon the rights of others, were bound in good conscience so to employ their prior lien upon the property levied upon, and the collaterals they had received as security for their debt, as not to disappoint and defeat the levy in the event it was perfected by judgment.

The collaterals, the choses in action transferred to Gusdorf & Co., were intended by the debtor, and were by them received, as a source or fund from which the debt reduced to judgment should be paid. It is true that, by taking the collaterals, the right to proceed by execution on the judgment was not intended to be delayed or postponed, and the creditor had the right to retain the collaterals, while pursuing legal remedies upon the judgment, and, if necessary to his full security and satisfaction, would not have been interfered with, or compelled to resort to the one in preference to the other. But having realized, by collection from the collaterals, the sum now in controversy, before satisfaction was obtained through the medium of the execution, that sum was by operation of law immediately applied to the satisfaction of his debt, extinguishing

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it *pro tanto*. A payment to him by the debtor of a like sum, at that instant of time, would not have been for that purpose more effectual. The source or fund from which moneys are derived often directs and controls their appropriation. And when a creditor receives moneys, derived from sources or funds which have been devoted to particular purposes, he is without right to appropriate them to other uses.—1 Am. Lead. Cases, 341; *Schiffer v. Feagin*, 51 Ala. 335; *Webster v. Singley*, 53 Ala. 208.

But it is said that after the levy of the execution and the transfer of the collaterals, there was an agreement between the debtor and the creditor, that there should be no appropriation of the moneys derived from the collaterals, until it was ascertained that the proceeds of the sale of the property levied on by execution were not sufficient to pay the debt. If any such agreement was made, it was subsequent to the levy of the attachment at the suit of the appellees, and after debtor and creditor had notice or knowledge of it. The levy created a lien, which could not be impaired by the subsequent acts or agreements of the debtor; and the creditor, having notice of it, was disabled from entering into any agreement by which the equitable obligation to exhaust the moneys arising from the collaterals, before resorting to the proceeds of the sales of the property levied upon and sold under execution, would be relieved for the benefit of the debtor, and by which he could regain the collaterals, or acquire the moneys realized from them, discharged from both debts.

All that it is needful to say now in reference to the subsequent garnishments at the suit of Hellman & Herman and Keifer & Brothers is, that there was not a debt owing from Gusdorf & Co., the garnishees, to Lehman, the debtor in attachment. A garnishment is a species of attachment, and like it is strictly a statutory remedy. It lies only for the subjection of debts, or demands, upon which the defendant in attachment can in his own name and right recover at law in an action of debt, or of *indebitatus assumpsit*. There was no debt due or owing by Gusdorf & Co. to Lehman, when the garnishment was served, nor could a debt arise from the transaction and relations existing between them, unless the money realized from the collaterals had exceeded the debt to the security of which they were appropriated. The money it is intended by the garnishments to reach, is not due or owing to Lehman; it forms a payment; it is not a debt; it is an extinguishment *pro tanto* of the debt due to Gusdorf & Co. Of the character of payment it was not deprived because Gusdorf & Co. did not make an application of it, retaining it in their hands, separate from the moneys received from the sheriff. The law, in view of the

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source from which it was derived, applied it in payment of the debt the collaterals from which it was realized were intended to secure. This application, without infringing upon the equities of the appellees, of which they had notice, Gusdorf & Co. could not avoid or refuse, converting themselves into debtors of Lehman.

In addition, the rights and equities of the junior attaching creditors were subordinate to the rights and equities the appellees, as prior attaching creditors, had acquired by their superior diligence. In courts of equity, as in courts of law, after-acquired rights by the employment of legal remedies yield precedence to clear rights acquired through like remedies.—*Herbert v. Mechanics' Building & Loan Association*, 17 N. J. Eq. 497. Upon the whole case, it seems clear that Gusdorf & Co. had double security for the payment of their judgment, while the appellees had a claim upon but one species of the property, constituting their security. From the fund upon which the appellees had no claim or lien, Gusdorf & Co. had in their possession a sum of money which it was their duty to apply in satisfaction of their judgment. If the application had been made, as it could have been without injury or inconvenience, a corresponding sum the appellees would have realized from the sales of the property upon which they had a lien, junior to that of Gusdorf & Co. Upon plain principles of equity and justice, they should be compelled to yield up the money derived from the collection of the collaterals, that it may be applied to the satisfaction of the judgment of the appellees. Otherwise, through mere wantonness, or caprice, or from mere indifference or favoritism, they would be permitted to work injury to another, of whose rights they had notice, and to whom they at least owed good faith.

When a sheriff, having collected money under legal process, is in doubt as to its proper appropriation, he may give notice to all parties in interest, make a statement of the facts, and apply to the court from which the process issued, and to which it is returnable, for its advice and direction.—*Henderson v. Richardson*, 5 Ala. 349. The parties interested in the distribution of the money, or either of them, may also apply to the court for its directions to the sheriff, and for the determination of their respective rights.—*Turner v. Lawrence*, 11 Ala. 426. In either case, the application is summary, addressed to the inherent power of the court to control its own process, preventing its misuse or abuse, and protecting its officers against the conflicting claims of suitors. The power has heretofore been exercised only when it was necessary to determine between rival claimants the priorities of legal liens, derived from legal process. In its exercise the court has not assumed jurisdiction of



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matters of purely equitable cognizance, nor has it undertaken to marshal assets, adjusting the equitable rights of rival claimants.—*Williams v. Rogers*, 5 Johns. 163; *Bruton v. Cannon*, Harper (S. C.) 389. The power the court exercises is of the same nature and character with that which is exercised in setting aside, upon motion, sales of land made under its process. It is not inconsistent with, nor in deprivation of the jurisdiction of a court of equity to interfere and grant fuller and more complete relief than can be obtained in a court of law.—*Ray v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 198. The marshaling of assets is peculiarly of equitable cognizance, and it is in the exercise of this jurisdiction the court applies its own doctrine, that a creditor having the security of two funds shall not so exercise his rights as to disappoint another creditor, who has the security of only one of them; a doctrine it often enforces through subrogation, which it alone can decree. In the present case, the jurisdiction of the court is undoubted.

We find no error in the record, and the decree of the city court must be affirmed.

## Long v. Musgrove.

### *Action for Slander.*

1. *Action for slander; when complaint insufficient.*—In an action for slander, if the words used are susceptible of two meanings, the one harmful and the other innocent, if they be ambiguous, or unmeaning in the absence of other stated facts, or if it be charged that they were uttered in irony, the pleader must set forth enough antecedent or attendant facts to raise the implication that the offensive charge was intended; merely asserting that the utterer intended to charge a particular crime, is not sufficient, unless the unaided words have that import.

2. *Same.*—Thus tested, it was held that a count in slander in the complaint in this case was insufficient on demurrer.

3. *Same; when charge free from error.*—In an action for slander, in charging plaintiff with the larceny of ballot boxes, a charge given at the defendant's request, instructing the jury that "larceny means the felonious and fraudulent taking of another's property, with the felonious intent to deprive the owner of the property, or to convert it to his own use; and if the jury believe that the words spoken by the defendant were not intended to convey, and did not convey to those who heard it the meaning that the plaintiff stole the ballot boxes for such a purpose, and with such felonious intent, then they must find for the defendant," is free from any error of which the plaintiff can complain.

APPEAL from Walker Circuit Court.

Tried before Hon. S. H. SPROTT.

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The nature of this action is sufficiently stated in the opinion. The third count of the complaint is in these words: "And the plaintiff claims of the defendant the further sum of two thousand five hundred dollars, as damages for falsely and maliciously charging the plaintiff with larceny, by speaking of and concerning him in the presence of divers persons, in substance as follows: That on the night the ballot boxes were stolen from the sheriff's office, he, defendant, was up in town looking for Buddie, and thought he was on the court house steps, and when he got up there, or near there, he saw T. J. King, J. B. Lollar and B. M. Long, meaning plaintiff, sitting on the steps, about 9 o'clock at night, and that the same persons were seen at the Baptist church the same night, about 12 or 1 o'clock, to-wit, on or about the — day of August, 1882. And plaintiff avers that the defendant thereby intended to create in the minds of the persons who heard him, the impression that the plaintiff had aided in stealing the said ballot boxes from the sheriff's office aforesaid. And plaintiff further avers that the said words, spoken by the defendant as aforesaid, were so understood by the persons who heard him, and by many others to whom they were told, to the injury of the plaintiff as aforesaid."

The charge referred to in the opinion, given at the defendant's request, is as follows: "Larceny means the felonious and fraudulent taking of another's property, with the felonious intent to deprive the owner of the property, or to convert it to his own use; and if the jury believe that the words spoken by the defendant, Musgrove, were not intended to convey, and did not convey to those who heard it, the meaning that Long stole the ballot boxes for such a purpose, and with such felonious intent, then they must find for the defendant." To this charge the plaintiff excepted.

The rulings of the circuit court in sustaining a demurrer interposed to the third count of the complaint, and in giving the charge requested by the defendant, are here assigned as error.

RICE & WILEY, for appellant. (1) The count to which the demurrer was interposed is sufficient.—*Holt v. Turpin*, 78 Ky. 433; *Lemons v. Wells*, *Ib.* 117; *Logan v. Logan*, 77 Ind. 558; *Feder v. Herrick*, 43 N. J. (L.) 24; *Foval v. Hallett*, 10 Ill. App. 265; *Campbell v. Campbell*, 54 Wis. 90; 13 U. S. Dig. (N. S.) pp. 560, 561, 563; *Walker v. Flynn*, 130 Mass. 151; *Works v. Stevens*, 76 Ind. 181. (2) The charge of the court to which exception was taken, is certainly *too exacting*; and it certainly required more evidence or proof to make out a larceny than any law book ever required. And as the charge is one which this court is unable to pronounce free from error,

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or in conformity to law, no court can say it did not injure the appellant; for no court is able to tell what effect such charge had on the jury.

H. C. TOMPKINS, with whom were HEWITT & WALKER, and T. W. COLEMAN, *contra*. (1) The words alleged in the third count as having been uttered by the appellee, are harmless, unless taken in connection with the proper averments, setting out that the crime had been committed, and the proper *colloquium*, showing their reference to the larceny of the ballot boxes. There is no reference in this count to the allegations of any other count, and taken by itself, it is wholly insufficient.—*Robinson v. Drummond*, 24 Ala. 174; *Smith v. Gaffard*, 31 Ala. 45; 2 Add. on Torts, p. 974, note K, and authorities cited. (2) There is no error in the charge given. The definition of larceny there given substantially conforms to the definition given by the elementary law writers and with the decisions of our court.—2 Bish. on Crim. Law (5th Ed.), § 757; *State v. Hawkins*, 8 Port. 461; *Spivey v. The State*, 26 Ala. 90. There is no slander unless the words spoken charge the commission of an indictable offense, involving moral turpitude, or drawing after it an infamous punishment.—2 Brick. Dig. p. 202, § 5; 2 Add. on Torts, p. 955 and notes. Here it is alleged that the offense charged was larceny. Under this complaint, then, there could be no recovery unless the jury were satisfied that the words used by appellee were intended to convey, and did convey the imputation that Long had committed the offense known to the law as larceny, and indictable. *Kirksey v. Fike*, 29 Ala. 206; 2 Add. on Torts, pp. 956-7 and notes; *Wright v. Lindsay*, 20 Ala. 428.

STONE, J.—The present was an action for slanderous words, alleged to have been uttered by appellee, of and concerning appellant. In the first and second counts, the alleged words import a charge of larceny of ballot boxes. The words charged in the third count do not, unaided, impute the commission of any indictable offense. This count avers that by the utterance of the words charged, the defendant falsely and maliciously charged the plaintiff with larceny, and that thereby he, the defendant, intended to create in the minds of the persons who heard him, the impression that the plaintiff had aided in stealing the ballot boxes from the sheriff's office, and that said words were so understood by the persons who heard him, and by many others, to whom they were told. The language of this count which immediately precedes the words alleged to be slanderous, is as follows: "That on the night the ballot boxes were stolen from the sheriff's office, he, the defendant,"



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etc. We have stated the substance of all that is charged in the count, except the words supposed to be slanderous, and which, as we have said, on their face impute no crime, nor act of moral turpitude. There was a demurrer to this count, which the court sustained.

Pleadings in actions of slander have been greatly simplified. When the words complained of import and impute a crime, then the complaint may be very simple and brief. But the slanderer does not always express himself in direct terms. If the words used are susceptible of two meanings, the one harmful and the other innocent, if they be ambiguous, or unmeaning in the absence of other stated facts, or if it be charged they are uttered in irony, then the pleader must set forth enough antecedent or attendant facts to raise the implication that the offensive charge was intended. Merely asserting that the utterer intended to charge a particular crime, is not enough, unless the unaided words import so much. Hence the use of what are called in the books inducement, or occasion, and the *colloquium*. These give point and direction to what would otherwise seem innocuous. —Odgers on Sl. & Lib. 118.

In the count we are considering, there is no averment that ballot boxes had been stolen, or that they were reputed to have been stolen. Nor is there averment that the sheriff's office was in the court-house. That is its usual place, but so important a factor in giving point to the circumstance, in itself innocent, of the plaintiff's presence at the court house at 9 o'clock at night, should not be left to inference. Nor can we perceive any connection between the plaintiff's presence at the Baptist church, at 12 or 1 o'clock that night, and the supposed larceny of the ballot boxes. The demurrer to this count was rightly sustained.—Townsend on Slander, §§ 132 *et seq.*; 2 Addison on Torts, 974, note k; *Campbell v. Campbell*, 54 Wis. 90.

The charge excepted to is a fair definition of the crime of larceny.—*Rountree v. The State*, 58 Ala. 381; 2 Whar. Am. Cr. Law, §§ 1769 *et seq.* If it declared the rule strictly, when considered in connection with the facts, that was a subject for an explanatory charge, and presents no ground for reversal. In one aspect the charge was unduly favorable to the plaintiff. It impliedly cast on Musgrove, the defendant, the burden of showing the words spoken "were not intended to convey, and did not convey to those who heard them, the meaning that Long stole the ballot boxes," etc. The *onus* rested on the plaintiff to establish this affirmative feature of his case.

Affirmed.

## May, Adm'r, v. Green.

### *Bill in Equity for Final Settlement and Distribution of Decedent's Estate.*

1. *Final decree; what is, and when appeal barred.*—A decree rendered in a cause made by a bill filed for the final settlement and distribution of a decedent's estate, assuming jurisdiction of the estate, removing the administration from the probate into the chancery court, ordering a reference on the administrator's accounts, and laying down rules by which they should be stated, is final, within the meaning of the statute authorizing appeals to this court; and hence, assignments of error based on such decree can not be considered on an appeal taken, more than twelve months after its rendition, from another decree rendered in the cause on the coming in of the register's report.

2. *Liability of administrator for interest.*—An administrator who, without sufficient excuse, postpones making a final settlement and distribution of the estate for an unreasonable period of time, is liable for interest on funds in his hands belonging to the estate, which he ought to have distributed, although he makes the exculpatory affidavit authorized by the statute (Code, 1876, § 2520).

3. *Commissions on collections and disbursements made by administrator in Confederate money; how estimated.*—An administrator is not entitled to full commissions in good currency on collections and disbursements made by him, during the late war, in Confederate money; but an equitable and just value of the usual commissions, reduced from a basis of Confederate currency to that of the present lawful currency of the country, is all that he can demand.

4. *Personal liability of administrator for purchase-money of lands sold by him.*—When an administrator fails to take sufficient sureties on a note for the purchase-money of land sold by him, or becomes himself surety for the purchaser, he is liable individually for the debt, and can not obtain a credit on his final settlement for attorney's fees and costs incurred and paid by him in collecting the debt from the purchaser.

5. *Extra compensation to administrator; services should be itemized.* To entitle an administrator to compensation for special or extraordinary services, proof should be made of each special service, and of its particular value; "the whole should not be aggregated by mere estimate, without being itemized."

6. *Decree against administrator and sureties in favor of his wife, erroneous.*—The husband, as the wife's trustee under the statute, is authorized to receive her distributive share in a decedent's estate; and hence, the husband being administrator of an estate of which the wife is one of the distributees, a decree against him and his sureties in her favor for her distributive share, on a final settlement of the estate in a court of equity, is erroneous.

APPEAL from Cherokee Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on 19th August, 1879, by Jonah Green and others, "heirs and devisees" of Hudson

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Kirk, who died testate on 8th December, 1858, against Samuel R. May, as the administrator of the estate of the said Kirk, and the sureties on his administration bond, and others, for the purpose of removing the administration of said estate from the probate court into the chancery court, and of there finally settling the same. On the 21st April, 1880, on a submission of the cause on the bill, the answers of defendants who had answered, and decrees *pro confesso* against those who had not, a decree was entered, taking jurisdiction of the estate of said testator, ordering the removal of the settlement from the probate court into the chancery court, directing a reference to the register for the purpose of stating the administrator's accounts, and prescribing rules by which the accounts should be stated. Under this decree the administrator filed his accounts and vouchers for a final settlement, and the settlement was had before a special register in May, 1881. In the account filed by the administrator, he did not charge himself with any interest, he making and filing with his account an affidavit that he had not used any of the funds of said estate for his own benefit.

It appears from the record that May was appointed administrator on 13th October, 1862. In 1863, he made a partial settlement and distribution; but he then neither claimed nor was allowed credit for commissions on a large amount of money which he had collected and which he then distributed in Confederate currency. On the final settlement, he claimed credit for said commissions; but, the item being contested, the register only allowed him one-fifth of the amount he claimed, which was the usual commissions allowed, it being scaled on account of the character of the currency in which the money was collected and distributed.

It also appears from the record, that on 7th December, 1868, the administrator sold, under an order of the probate court, for distribution, certain lands belonging to the estate, the terms of sale being one-half cash, and the balance at twelve months. Part of these lands the administrator himself purchased for \$3850, and the balance was sold to J. J. Scroggins for \$3500, the administrator himself becoming his surety for the credit installment. On the final settlement, on motion of the devisees and distributees, the register charged him with interest on the proceeds of these sales as follows: On \$3675, one-half thereof, from the day of sale, and on \$3675, from the 8th December, 1869, when it became due and payable. It also appears that the register charged the administrator with interest on the proceeds of the sale of other lands belonging to the estate, which he sold, from February 11th, 1878, and from same day in 1879, which appear to be the dates when the said proceeds were collected; and also on a designated balance against him,



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as shown by a partial settlement made by him in 1869. The record fails to disclose any reason for the delay in making final settlement; and the reason assigned by the register for charging the administrator with interest is, that "the funds were allowed to lie unproductive for a great length of time, without any sufficient excuse."

It also appears from the register's report, that Scroggins having made default in paying for the lands purchased by him, suit was brought against him in the circuit court for the balance due thereon, "including a note for \$285, which was given for a portion of the cash payment which was not actually paid." The administrator having "failed to make the money in this suit," he filed a bill in the chancery court to enforce a vendor's lien therefor. On the settlement the administrator claimed a credit for attorneys' fees and costs paid by him in that litigation; but, on objection by the distributees, the credit was refused by the register. The register also refused the administrator credit for \$50 paid his attorneys "for services in assigning dower" to the widow. "This is rejected by the register, with the costs of the proceedings, as being properly chargeable to the widow." The register allowed the administrator credits for divers sums of money which he had *paid* to his attorneys for services rendered him by them in matters pertaining to the estate; but he refused him credits for amounts *due* by him to them for similar services, which he had *not paid*.

As further stated in the report, "the administrator claims \$500 for extra services. He testifies they were worth this; that he supposed he had made five hundred trips to Centre. W. H. Kirk also swore that May was the active administrator [he having a co-administrator], and the estate had been a good deal of trouble. But as no itemized statement of special services or expenses was made or proved, the register has no data by which to make an allowance. Any credit of this kind would be guess-work, and, therefore, no credit is allowed."

The other facts necessary to an understanding of the points decided, are given in the opinion. Exceptions were reserved by the administrator to the register's report, saving the rulings above noted for review by the chancellor. On a submission of the cause on the report of the register and the exceptions thereto, the chancellor caused a decree to be entered, overruling the exceptions, confirming the report, and distributing the balance reported by the register to be due from the administrator. The assignments of error here made are based on that decree, and the decree of 21st April, 1880.

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for appellants. (No brief came to the hands of the reporter.)

AIKEN & MARTIN and ELLIS & BRADFORD, *contra*.—(1) The decree of 21st April, 1880, was a final decree, and would have supported an appeal to this court.—*Walker v. Crawford*, 70 Ala. 567; *Munter v. Linn*, 61 Ala. 492; *Bradford v. Bradley's Adm'r*, 37 Ala. 453; *Waldrop v. Carnes*, 62 Ala. 374. This decree having been rendered more than twelve months before the taking of the appeal, the motion to strike out the assignments of error based thereon should be granted. (2) The administrator was liable for interest as charged against him in the register's report, notwithstanding the affidavit made by him.—*Mims v. Mims*, 39 Ala. 716; *Harrison v. Harrison*, 39 Ala. 511; 2 Will. on Ex'rs, m. p. 1567; *Pearson v. Darrington*, 32 Ala. 269; *Clark v. Knox*, 70 Ala. 607; *Nunn v. Nunn*, 66 Ala. 35. He is liable on the Scroggins purchase, 1st, because he failed to take sufficient surety, he being one of them. He is a principal obligor in the note, and liable for the amount thereof from the day he signed it.—*James v. Faulk*, 54 Ala. 184; 49 Ala. 599; 54 Ala. 389. 2d. Because, by becoming surety on the note, he became liable to the estate for so much cash as soon as due.—*Cochran v. Martin*, 47 Ala. 525; *Kennedy v. Kennedy*, 8 Ala. 391; *Childress v. Childress*, 3 Ala. 752. (3) The appellant can not complain of the register's ruling as to the item for commissions for moneys distributed on settlement in 1863. He must take his commissions in the same kind of currency he distributes.—*Dockery v. McDowell*, 40 Ala. 480. The evidence shows that he afterwards received about the amount of the credit claimed in Confederate money, which he allowed to die on his hands, and with which he has not been charged. (4) Allowance of attorneys' fees discussed with following authorities cited: *Harris v. Martin*, 9 Ala. 895; *Teague v. Corbett*, 57 Ala. 529; *Bates v. Vary*, 40 Ala. 421. (5) The register properly refused extra compensation to the administrator. The items are not furnished, and there was no evidence that extra services were rendered. *Wright v. Wilkerson*, 41 Ala. 273; *Pearson v. Darrington*, 32 Ala. 273.

SOMERVILLE, J.—The decree rendered by the chancellor in this cause, on the 21st April, 1880, is obviously a *final decree* in every essential particular. It shows that the cause was submitted for disposition by final decree, that the court assumed jurisdiction of the estate of the testator, as prayed by the bill, ordered the removal of its settlement from the probate to the chancery court, referred the taking of the account to the register, and laid down the rules by which the administrator was to

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be governed in making a statement of his account with the estate and with the distributees. This was a settlement by the chancery court of all the equities of the case, leaving nothing to be done but the actual taking of the account by the register. The decree is, therefore, final.—*Walker v. Crawford*, 70 Ala. 567; *Jones v. Wilson*, 54 Ala. 50; *Garner v. Prewitt*, 32 Ala. 18.

This appeal not having been taken within one year from the date of its rendition—the limit fixed by statute—no assignments of error can be predicated upon any supposed errors in it. The motion made to strike out the assignments of error having reference to the rulings of the court as appearing in this decree, must be sustained.

The rule may now be considered as firmly settled by the decisions of this court, that when an administrator, without sufficient excuse, procrastinates making a final settlement and distribution of an estate for an unreasonable length of time, he is liable for *interest* on funds of the estate in his hands, and which should have been distributed by him to the parties entitled, although he may make the exculpatory affidavit required by section 2520 of the Code, expressly denying the fact that he has used such funds for his own benefit.—*Clark v. Knox*, 70 Ala. 607; *Clark v. Hughes*, 71 Ala. 163. It does not appear that the register has been guilty of any misapplication of this rule in the charges of interest made against the administrator in the statement of his account.

The administrator was not entitled to full commissions in good currency on the large amount of Confederate money collected and distributed by him. The equitable just *value* of the usual two and a half per cent., reduced from a basis of Confederate currency to that of the present lawful money of the country, is all that could be demanded. The register allowed one-fifth, and this is not shown to be unreasonable.—*Dockery v. McDowell*, 40 Ala. 476; *Cummings v. Bradley*, 57 Ala. 224. The evidence shows, moreover, a balance of Confederate money which fell as worthless in the administrator's hands at the termination of the war, which was quite sufficient to have discharged these commissions. He is not charged with this money in his account, and he should have used it in paying what was due himself by the estate. He should not have received a currency from others which he declined to take himself.

The chancellor properly refused to allow any attorneys' fees or costs incurred by the administrator in his litigation with Scroggins, in which he sought to enforce collection of the note given for the purchase-money of land sold under an order of the probate court. The administrator was himself a surety on this note, having voluntarily assumed in such capacity to guar-



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antee its punctual payment to the estate when due. The judgment obtained at law proved fruitless in consequence of the administrator's failure to take two good and sufficient sureties on the note, as he was required to do by statute.—Code 1876, § 2461. This, of itself, rendered him chargeable with the purchase-money.—*Jones v. Faulk*, 54 Ala. 184; *Walls v. Grigsby*, 42 Ala. 473. As one of the sureties on the note, the administrator's duty was plain. He owed the debt as much as the principal, and he was not entitled to expenses occasioned by his own and his principal's default, or breach of legal duty. He should have charged himself with the full amount of the purchase-money, with lawful interest, without burdening the estate with the costs of his own negligence.

We discover no error in the amount allowed the administrator for attorneys' fees.

The record fails to disclose any special or extraordinary services for which the administrator was entitled to compensation. Proof, moreover, should have been made of each special service with its particular value, and the whole should not have been aggregated by mere estimate without being itemized.

We are of opinion, however, that the decree of the chancellor is erroneous in one particular. The appellant, Samuel R. May, was the husband of Martha F. May, who was one of the distributees of the estate of Hudson Kirk, of which he was administrator. He, therefore, had a right to collect for her, as her statutory trustee, her distributive share of the estate. The language of the statute is: "The husband has power to receive property coming to his wife, or to which she is entitled, and his receipt therefor is a full discharge in law and equity." Code 1876, § 2710. The decree for two thousand and fifty-one 25-100 dollars, rendered in favor of Mrs. May against her husband and his sureties on the administrator's bond, can not, for this reason, be sustained. The husband was authorized to receive the amount, and his receipt of it was a satisfaction of the claim. If he converted it to his own use in violation of his trust, the wife's only remedy was by bill in equity, filed for the purpose of removing him from the trust, because of his unfitness or incapacity leading to his indiscreet management of her property.—Code 1876, § 2717.

The decree of the chancellor must be reversed, and a decree here rendered, adjudging that Mrs. Martha F. May is entitled to recover no portion of her share of said estate which went into the hands of her husband, the said Samuel R. May. And a decree will, furthermore, be here rendered, adjudging each of the other distributees entitled to recover the several sums adjudged them by the chancellor, as set forth in his decree, no change being made therein except as to the share of Mrs. May.

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## Daughtery v. American Union Telegraph Company.

*Assumpsit against Telegraph Company to recover Damages for Non-Delivery of Message.*

1. *Breach of executory contract ; measure of damages.*—It is a rule of universal acceptance, that damages for the breach of an executory contract, to be recoverable, must be the natural and proximate consequence of the breach, not speculative or contingent ; that is, such damages as result in the usual course of things, as distinguished from accidental or collateral injury, or from such as would spring out of special circumstances, not usually attendant upon such transactions.

2. *Same ; extent of recovery can not be tested on demurrer.*—If, in such an action, any thing is recoverable, demurrer is not the way to test the extent of recovery ; but this should be done by objections to testimony and by charges.

3. *Liability of telegraph company for failure to deliver message ; measure of damages.*—The proposition is fully sustained by the authorities, that, where a telegraph company receives, and, for a valuable consideration, agrees to transmit and deliver a message, expressed in plain language, directing the sale of cotton owned by the sender, and, without lawful excuse, fails to transmit and deliver the message in due time, the sender can recover the actual damages sustained by the fall in the market-price of the cotton between the time it would have been sold, if the message had not been delayed, and the time it was actually sold ; qualified, however, by the further proposition, that so soon as the sender discovers that his message has not been forwarded, it becomes his duty, within a reasonable time, to take the requisite steps to prevent further loss, which is usually done by repeating the order or direction to sell.

4. *Same ; measure of damages when message in cipher.*—The liability of the telegraph company not depending on the knowledge which the operator may have of the contents of the message, the same rule as to the measure of damages applies even where the message is in cipher, and is not explained to the operator, who is ignorant of its purport and object.

5. *Measure of damages ; Hadley v. Baxendale, criticised and limited.* The rule for the assessment of damages recoverable on a breach of contract, laid down in *Hadley v. Baxendale*, 9 Exch. 341, that they are “such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it,” criticised and limited.

6. *Suit on contract by telegraph company for delivery of message.*—If an agent, in delivering and paying for the message to be forwarded, discloses the name of his principal, for whom he is acting, the contract for the transposition and delivery of the message being oral, this makes it the principal's contract, upon which he can, and should sue in his own name.

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

The facts are stated in the opinion.

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J. M. CHILTON, for appellant. (No brief came to the hands of the reporter.)

W. H. BARNES & SON and JOHN S. BIGBY, *contra*.—(1) Among other grounds, the telegraph company insists that the appellant can not maintain his action, because the damages claimed were not within the contemplation of the company at the time the contract was made. The message was purely a cipher message, and the company was not informed of its meaning or value, at the time of its delivery for transmission. The correct rule for the measure of damages is laid down in *Hadley v. Baxendale*, 9 Exch. 353, and is as follows: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach, should be such as may fairly and reasonably be considered, as either arising naturally, i. e., according to the natural course of things, from the breach itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. This rule has been approved in the following cases: *Griffin v. Colver*, 16 N. Y. 491; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, and cases cited; *Landsberger v. Tel. Co.*, 32 Barb. 530; *British Columbia S. M. Co. v. Nettleship*, 3 L. R. C. P. 499; *Horne v. Midland R. Co.*, 7 *Ib.* 590; 8 *Ib.* 131; *Cory v. Thames Iron Co.*, 3 L. R. Q. B. 190; *Hobbs v. London R. Co.*, 10 *Ib.* 111; 11 Eng. R. 181; *Elbinger v. Armstrong*, 11 *Ib.* 127; *Simpson v. London & N. W. R. Co.*, 16 *Ib.* 330; *Candee v. W. U. Tel. Co.*, 34 Wisc. 471; 17 Am. Rep. 452; *Sanders v. Stuart*, 17 Eng. R. 268; *Bryant v. Am. Tel. Co.*, 1 Daly, 575; *Leonard v. Tel. Co.*, 41 N. Y. 544. See also Abbott's New Cases, pp. 155-165; *Shields v. Washington Tel. Co.*, (La. 1852), Allen Tel. Cas. 5; *Lane v. Montreal Tel. Co.*, (Canada, 1857), *Ib.* 61; *Kinghorne v. Montreal Tel. Co.*, (Canada, 1859), *Ib.* 98; *Dorgan v. Tel. Co.*, (U. S. Cir. Ct. Southern Dist. Ala., April, 1874), 1 Am. L. T. R. N. S., Sept. 1874, p. 407; *Beaupre v. P. & A. Tel. Co.*, 21 Minn. 155; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *Behrn v. W. U. Tel. Co.*, U. S. Cir. Ct., Jan'y, 1878; *Hord v. W. U. Tel. Co.*, (Sup. Ct. Cincinnati, 1878), Cin. Law Bulletin, Feb'y, 1878, p. 147; *Barnesville Bank v. W. U. Tel. Co.*, 30 Ohio St., p. 555; *Mackay v. W. Tel. Co.*, 16 Nev. 222; *W. U. Tel. Co. v. Martin*, 9 Bradwell, 587; Wood's Mayne on Dam. (1st Am. Ed.) p. 40, § 35. (2) The rule which requires damages recoverable to have been within the actual contemplation of the parties, is to be strictly construed in favor of telegraph companies, which are not voluntary contracting parties.—*Breese v. U. S. Tel.*



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*Co.*, 45 Barb. 274; s. c. 48. N. Y. 132; *Belger v. Dinsmore*, 51 *Ib.* 166; *Horne v. Midland R. Co.*, 7 L. R. C. P. 590; s. c. 8 L. R. C. P. 135; *Smeed v. Foord*, 1 Ell. & Ell. 616; *British C. Saw Mill Co. v. Nettleship*, 3 L. R. C. P. 505.

STONE, J.—In suits such as this, to authorize recovery, the damages must be the natural and proximate consequence of the breach. Speculative or contingent damages can not be recovered. What is meant by the phrase, “natural consequence,” is the damage which would result in the usual course of things, as distinguished from accidental or collateral injury, or such as would spring out of special circumstances, not usually attendant upon such transactions. The foregoing rules are of universal acceptance, and are invoked in almost, or quite every judicial contention, growing out of breaches of executory contracts.

The present suit is an action of assumpsit, brought by the appellant against the appellee, telegraph company, to recover damages for the non-delivery of a message, which the latter received, and, for a consideration, promised to deliver. The message was in cipher, and did not disclose to the uninitiated what its meaning and purpose were. Though expressed in letters of the English alphabet, and susceptible of being rendered into sound, they were but symbols, not understood, and not intended to be understood, save by those instructed in the secret art. They were not explained to the telegraphic operator, and he was ignorant of the purport and object of the message. It was addressed to a well known firm of cotton brokers in the city of New York, and the complaint alleges that if it had been transmitted and delivered to that firm according to the usual course of telegraphy, they would have understood it, and acted on it; that its true import was a direction to the brokers to sell three hundred bales of cotton previously purchased by plaintiff in that city, one hundred bales to be delivered in that month—January, 1881—and the remaining two hundred bales to be delivered in the month of May following; that if the message had been transmitted and delivered in due time, the brokers would have made the sale, and thus realized to him, the sender, one hundred dollars profit in the purchase and resale; that in consequence of the non-delivery of the message, the cotton was not sold, but remained on hand; and that when, several days afterwards, it became known and necessary to send another direction to sell, in consequence of the non-delivery of the first, the price of cotton had materially declined; and, on a sale then made, plaintiff sustained a loss of a thousand dollars. Plaintiff claims this sum, as damages suffered by the defendant's breach of contract. Several grounds of demurrer

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were interposed by the defendant, and the circuit court sustained them all. The fourth ground is in the following language: "The complaint shows that the dispatch sent was a cipher dispatch, unintelligible to the operator—agent—that sent the same, and it fails to show that the said agent was informed as to the importance and value of the said dispatch, or that it was of any importance."

The ruling of the circuit court on this ground, or cause of demurrer, is sought to be maintained by the following argument: That in suits for breach of contract, only such damages can be recovered, as were within the contemplation of the parties when the contract was entered into; that the telegram attempted to be sent in this case, being in cipher and its contents and purpose unknown to the company's operator, it is impossible the damages claimed could have been within the contemplation of the telegraph company, or its operator. On this ground it is claimed that only the price paid for the telegram can be recovered. This concession itself shows that this ground of demurrer should not have been sustained. If any thing was recoverable, demurrer is not the way to test the extent of recovery. That is done by objections to testimony, and by charges. But, aside from the right to recover the cost of the message, whenever there is an unwarranted breach of contract, some damages may be recovered—nominal damages, at least. The argument here urged has a wider and deeper scope, and denies the right of the plaintiff to recover the loss sustained in the delayed sale of his cotton.

The authorities fully sustain the proposition, that if the telegram had been expressed in plain language, directing the sale of plaintiff's cotton, and the telegraph company, without lawful excuse, failed to transmit and deliver it in due time, then the plaintiff can recover the actual damage he sustained by the fall in the market price of cotton, between the time it would have been sold if the message had not been delayed, and the time it was actually sold. Of course, this is qualified by another principle, namely: That as soon as the plaintiff discovered his message had not been forwarded, it became his duty, within a reasonable time, to take the requisite steps to prevent further loss. This is usually done by repeating the order or direction to sell. The following authorities support the proposition asserted above: *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *Leonard v. N. Y., A. & B. Magn. Tel. Co.*, 41 N. Y. 544; *True v. Int. Tel. Co.*, 60 Me. 9; *N. Y. & W. Pr. Tel. Co. v. Dryburg*, 35 Penn. St. 298; *U. S. Tel. Co. v. Wenger*, 55 Penn. St. 262; *W. & N. O. Tel. Co. v. Hobson*, 15 Gratt. 122; *W. U. Tel. Co. v. Ward*, 23 Ind. 377; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421; *Manville v. W. U. Tel. Co.*, 37 Iowa, 214; *Turner v. Hawk-*

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*eye Tel. Co.*, 41 Iowa, 458; *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549; *W. U. Tel. Co. v. Blanchard*, 68 Ga. 299; s. c. 45 Am. Rep. 480. In many of these cases the messages were not self-explaining.

In support of the main ground of demurrer under consideration, appellee relies on the following authorities: *Landsberger v. Magn. Tel. Co.*, 32 Barb. 530; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *Bank v. W. U. Tel. Co.*, 30 Ohio St. 555; *Candee v. W. U. Tel. Co.*, 34 Wis. 471; *Beaupre v. Pac. & Atl. Tel. Co.*, 21 Minn. 155; *Mackay v. W. U. Tel. Co.*, 16 Nev. 222; *Hobbs v. L. & S. W. Ry. Co.*, 10 L. R. (Q. B.) 111. The following cases, cited from Allen's Telegraph Cases (the reports are not in our library), are also relied on: *Shields v. Wash. Tel. Co.*, p. 5; *Lane v. Mont. Tel. Co.* (Canada), p. 61; *Stevenson v. Mont. Tel. Co.*, p. 71; *Kinghorne v. Mont. Tel. Co.*, p. 98. Some of these rulings were made on cipher telegrams; others are messages which, unexplained, did not disclose the extent or full import of any transaction had in contemplation by the parties; and in all, substantial damages were refused, because neither the messages, nor other information given, made known to the operator what was contemplated. Hence, it was ruled that plaintiffs could not recover of the telegraph company what, not understanding, it could not have contemplated as the effect of a miscarriage or other failure. These authorities sustain the argument they are cited to support. Several of the cases, however, rest, not on cipher telegrams, but on messages which, by their brevity, or for some other reason, failed to give full information of their import. They are not reconcilable with several of the cases above cited by us, in which plaintiffs recovered.

The question we are considering, in reference to cipher or obscure telegrams, is of comparatively modern presentation. The oldest adjudication, asserting the doctrine contended for, is little more than a dozen years old. The telegraph itself is a new invention, and, of course, special rules adapted to it must be modern. Possibly the oldest case, which withheld damages because the dispatch was unintelligible to the operator, was a *nisi prius* ruling in Louisiana, in the case of *Shields v. Washington & N. O. Tel. Co.*, reported in 1 Livingston's Law Mag. 69; 4 Amer. Law Jour. (N. S.) 311. We have no access to the full report of this case, and can not tell by what authorities it was supported. *Landsberger's case*, from 32 Barber, was not in cipher, but was obscure. Relief was denied on the ground that the damages claimed were too remote. That case was decided in 1860. *Baldwin's case*, 45 N. York, 744, *Gildersleeve's case*, 29 Md. 232, *Lane's case*, Allen Tel. Cas. 61, *Stevenson's case*, *Ib.* 71, *Kinghorne's case*, *Ib.* 98, and *Beaupre's case*,



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21 Min. 155, were all similar cases of obscurity in the message—not self-explaining. *Candee's case*, 34 Wis. 471, and *Mackay's case*, 16 Nev. 222, are all cipher dispatches. We can perceive no reason, however, for a different rule, as applicable to the two classes. If it be essential in case of a cipher telegram that its contents and object be explained, what reason can be urged for a different rule, when the dispatch, though legible, is yet so briefly and obscurely expressed, that no one can understand its import or magnitude, save the sender and receiver? If the information be material in the one case, it must be in the other.

As we have seen, the argument on which the decisions under discussion have been rested, is that they are too remote, not being within the contemplation of the parties. *Hadley v. Baxendale*, 9 Exch. 341, is relied on as declaring the underlying principle, which supports all these rulings. This case was decided in 1854 by a very able bench, after great deliberation, and is everywhere regarded as a leading case. Plaintiffs were proprietors of a mill in Gloucester, which was propelled by steam, and which was engaged in grinding and supplying meal, flour, etc., to customers. The shaft of the engine got broken, and it became necessary that the broken shaft be sent to an engineer or foundry-man at Greenwich, to serve as a model for casting or manufacturing another that would fit into the machinery. The broken shaft could be delivered at Greenwich on the second day after its receipt by the carrier. It was delivered to the defendants, who were common carriers engaged in that business between these points, and who had told plaintiffs it would be delivered at Greenwich on the second day after its delivery to them, if delivered at a given hour. The carriers were informed the mill was stopped, but were not informed of the special purpose for which the broken shaft was desired to be forwarded. They were not told the mill would remain idle until the new shaft would be returned, or that the new shaft could not be manufactured at Greenwich until the broken one arrived to serve as a model. There was delay beyond the two days in delivering the broken shaft at Greenwich, and a corresponding delay in re-starting the mill. No explanation of the delay was offered by the carriers. The suit was brought to recover damages for the lost profits of the mill, caused by the delay in delivering the broken shaft. The judgment of the court was pronounced by Baron Alderson. He said: "We think the proper rule in such a case as this is—where two parties have made a contract which one of them has broken,—the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the

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usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made, were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

The first thought which suggests itself in a perusal of the foregoing language is, that it declares two rules for the assessment of damages for a breach of contract. First, where there are no special circumstances in the case, to distinguish it from the great mass of contracts of the same kind. In all such cases, the damages recoverable are such as naturally and would generally result from such breach, "according to the usual course of things." The shipment in this case was of a broken casting, usually valuable as old iron, to be recast into something else. It was not the case of a commodity, whose form, appearance and condition indicated nothing. Its natural appearance—that which would strike the general beholder—was, that it was useful, and only useful as old iron. Thus considered, its only appreciable value was its marketable quality; and the damage the shipper would suffer from delay in its delivery would, according to the usual course of things, be the delay in realizing its proceeds, and a fall in the market price, if the market should give way between the time it should have been delivered according to contract, and the time it was actually delivered. This is a rule of very general application in commercial dealings; a rule for the assessment of damages, in very many breaches of contract. Of course, it has exceptions. If the injury, or alleged lost profits be speculative, or so contingent that no reasonably certain rule can be declared for their measurement, then they can not be recovered on that account. *W. U. Tel. Co. v. Shotter*, (Ga.) 18 Cen. Law Jour. p. 230, (Mar. 21, 1884).

The second rule is, where there are special circumstances in the contract and its observance, which take it out of the usual course of things. Very many contracts have this character.

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The following are of this class: *Ill. Cen. R. R. Co. v. Cobb*, 64 Ill. 128; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Randall v. Raper*, Ellis, B. & E. (Q. B.) 84; *Borradaile v. Brunton*, 8 Taunt. 535; *Passinger v. Thorburn*, 34 N. Y. 634; *Flick v. Wetherbee*, 20 Wisc. 412; *Sneed v. Foord*, 1 E. & E. (Q. B.) 602; *Horne v. Midland Ry' Co.*, 7 L. R. C. P. 583; s. c. 8 L. R. C. P. 131. If these special circumstances be unknown—not communicated,—then they are not the natural result of the breach, for they did not result from it in the usual course of things. If, however, they are communicated, they become an implied element of the contract, and parties are presumed to contract in reference to such special circumstances. Many illustrations of this rule might be given. We will name but a few. A carrier receives a package for transportation, having the appearance of being of but little value; nothing about it to show it requires special care, or tender handling. If he give it such attention as such packages usually require for their preservation, he will not be liable for the unknown, extra value it may possess. An agent receives money to be deposited in bank, the object being to meet a paper maturing. It is necessary, to avoid protest, that the money be in bank by a given hour, but the agent is not informed of it. He fails to deliver the money in time, the paper goes to protest, and the credit of his principal is ruined. The agent is not responsible for the loss, for he neither expressly nor impliedly contracted in reference to the duty, which alone could have prevented the injury.

What is here last said, is our understanding of the second rule declared in *Hadley v. Baxendale*. The two rules are distinct, operate in different fields, and to treat them together necessarily leads to confusion. In a very carefully prepared, learned note to the 7th edition of Sedgwick on Dam. vol. 1, 226, is this language: "The rule in *Hadley v. Baxendale*, as we have seen in the text, is that the plaintiff is entitled to recover, (1) such damages as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from the breach of the contract itself; or (2) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach."

The rule, or rather rules, declared in *Hadley v. Baxendale*, as interpreted in the note to Sedgwick, is not difficult to be understood. It furnishes a standard of measurement in ordinary transactions—those marked by no special circumstances. The subject of the contract, or nature of the service contracted for, generally suggests the use for the one, or the purpose of the other. The damage which would suggest itself as the nat-



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ural result—according to the usual course of things—of a breach of such contract, would be the loss of the one, and the failure to enjoy the other, as they thus appeared. Suppose, however, there be special circumstances, which impart to the subject or service a value and importance their appearance does not indicate. This is outside of the usual course of things, and falls within Baron Alderson's second rule, which requires that the party sought to be charged shall have had notice of such special circumstances when he entered into the contract. A builder undertakes to erect and complete a dwelling by a named day. If no special circumstances are communicated to him when he enters into the contract, the measure of liability to which he will be exposed, if he fails to complete the house by the day named, is the value of the lost use the employer suffers by the delay, if such damages can be shown by any rule of proximate certainty. Suppose, however, the house has been agreed to be let for a term on a valuable lease, on agreement to let in the tenant on the named day, and the contractor has notice of such lease. If he fail to complete the house by the day named, and the landlord thereby lose his tenant and the profits of his lease, the contractor will be liable for such lost profits. This, by reason of the special circumstances communicated.

In *Hadley v. Baxendale*, it is said of damages that may be recovered on a breach of contract, that they "should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it." What is meant by the words, *in contemplation of the parties*? It would seem that contracting parties—certainly honest ones—do not contemplate the breach of their contracts when they enter into them, and, hence, can not contemplate the consequences of a breach. Martin, one of the Barons of the Exchequer who participated in the decision in *Hadley v. Baxendale*, in the later case of *Wilson v. Newport Dock Co.*, 1 L. R. Court of Exch. 177, used this language: "I do not adopt the qualifications mentioned by Mr. Baron Alderson in the judgment in *Hadley v. Baxendale*, as applicable to every case. They may have been perfectly right there, but they are not of universal application. . . . And he [Baron Alderson] proceeds to say, 'such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.' Now this may properly enough be taken into consideration in the case of carriers and their customers, but in

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the bulk of broken contracts it has no application whatever. Parties entering into contracts contemplate that they will be performed, and not broken; and in the infinite majority of instances, the damages to arise from the breach never enters into their contemplation at all." So, in *Collins v. Stephens*, 58 Ala. 543, we said: "The measure of damages in a suit for a breach of contract . . . is the injury which results proximately from the breach. And whether the parties, at the making of the contract, contemplated or had in view the damages to result from a breach of such contract, or not, does not in the least vary the question, or the measure of recovery." To test the question, let us suppose that in a suit for a breach of contract, the plaintiff makes proof of damage, reasonably certain as to amount, which is the natural result—that is, the result according to the usual course of things—of the breach of contract. Would any one attempt to defend on the ground that such damages were not, in fact, in contemplation of the parties, when they entered into the contract?

Mr. Baron Alderson's language should be interpreted in the light of the facts he was dealing with. Plaintiffs were claiming a recovery, based on circumstances that were special and exceptional. Those circumstances were not suggested, nor likely to be suggested, by the appearance or nature of the article which was the subject of the contract. Hence, the injury complained of would not arise in the natural, or usual course of things. If the special, ulterior purposes were disclosed, they would then become an element of the duty imposed by the contract. The thing of apparently little value—the transaction of apparently minor importance—would thus be raised to great value and commanding importance. This enhanced value, this stimulated diligence, Baron Alderson, as we think, attempted to describe, as being the damages resulting from a breach, "within the contemplation of the parties." Is it not rather a bringing within the contemplation of the parties the special facts which magnify the transaction, and, as a consequence, the injury likely to ensue from a breach of the contract?

We are aware that the language, or phrase we have been criticising, has been repeated and re-repeated in many judicial opinions. It has come to be almost a stereotyped phrase; so general, that it may appear to be temerity in us to question its propriety. We think, however, it is in itself inapt and inaccurate, and that its import has been greatly and frequently misunderstood. It is often employed in apposition to, or as the synonym of that other qualifying clause—the *natural result of*, or *in the usual course of things*. We think this a great departure from the sense in which Baron Alderson intended it

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should be understood. Altogether, we think it obscure and misleading, and that an attempt to install it as one of the canons, has caused many, very many erroneous rulings.

But even if we retain the expression we have been commenting on, as a qualifying property of recoverable damages, it is a rule by no means of universal application. Speaking of the decision in *Hadley v. Baxendale*, Ch. B. Pollock, in *Newport Dock Co. v. Wilson*, 1 L. R. (Exchr.) 177, said: "It is quite true that the case is not applicable to, and does not decide every case. No rule, no formula could do that. . . . No precise, positive rule can embrace all cases." It may be, and doubtless is well adapted to cases like *Hadley v. Baxendale*, where the subject of the contract, relatively insignificant in its primary aspect and apparent purpose, was yet, by special circumstances, magnified into much greater dimensions. This rule was properly applied in that case, because a knowledge of the extrinsic facts would naturally stimulate diligence. Can such a rule, with any propriety, be applied to transactions or lines of dealing, in which the same measure of diligence is required in each act or function, without regard to the quantum of interest to be affected by it? Legal dogmas should rest on some principle, which can be appreciated.

The telegraph is a modern discovery. Speedy communication is its boasted merit, the object of its use. It is much more expensive than communications by mail, and therefore would not be resorted to, if time were not of its very essence. Its tariff of rates is graduated by the number of words employed, not by the pecuniary value of the telegram, nor by the magnitude of the interests it concerns. With few exceptions, imposed by public exigency, it is governed by the law of the mill. Messages must be sent in the order of their handing in, without favor or partiality, without delay, and without reference to the value of the interests to be affected.—Shear. & Redf. on Neg. § 557; *Barren v. Lake Erie Tel. Co.*, 1 Amer. Law Regr. 685; *Birney v. N. Y. & W. Tel. Co.*, 18 Md. 341; *W. U. Tel. Co. v. Ward*, 23 Ind. 377; *Leonard v. N. Y., A. & B. Tel. Co.*, 41 N. Y. (2 Hand) 544; *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422. A failure from uncontrollable causes, such as electrical storms, etc., would excuse the company's delay in delivery; but no such excuse is shown here. In Scott & Jarnigan's note to section 166, Law of Telegraph, commenting on *Shields v. W. & N. O. Tel. Co.*, is this language: "Why has the operator any right to know what the message refers to? Or, why the necessity of drawing inferences or conjectures in reference thereto? How will such knowledge aid him in the discharge of his obligation to send the message correctly? What differ-

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ence does it make, in this respect, whether the message 'conveyed an order to purchase, or an account of sales?' Would such knowledge aid him in the correct transmission of the message?" They thought the view taken in *Shield's case* "was not the correct one." We fully concur with Messrs. Scott & Jarnigan, and hold that the liability of the telegraph company does not depend on the knowledge the operator may have of the contents of the message.

The fifth ground of demurrer is, "That the complaint shows that the dispatch was in relation to a future contract in cotton, in which the parties did not contemplate the delivery of cotton, but at the time appointed for delivery, the transaction should be closed upon the basis of the then market price of the cotton, the losing party paying the difference." We do not think the complaint shows there was to be no delivery, and consequently we need not, and do not consider the question attempted to be raised by this ground of demurrer.

The first three grounds of demurrer raise the same question, and deny the right of the plaintiff to maintain the action in his own name. We think this ground of demurrer was also improperly sustained. The point of this objection to the complaint is, that Renfro Brothers are shown to have made the contract with the telegraph company in their own name; and the contract not being for the payment of money, the suit should have been brought in their name. This point is certainly well taken, if the proper construction of the complaint is that which is contended for.—Code of 1876, § 2890; *Johnson v. Martin*, 54 Ala. 271; *Masterson v. Gibson*, 56 Ala. 56; *Agnew v. Leath*, 63 Ala. 345. It is certainly true that the message proposed to be sent, as copied in the complaint, is signed Renfro Bros. But the message is not the contract declared on. The complaint avers, in substance, that the plaintiff made the contract through his agents, Renfro Bros. The contract declared on we suppose was oral. It is not averred that it is in writing. If, in delivering and paying for the message to be forwarded, the Renfro Bros. disclosed the name of their principal, for whom they were acting, that constituted it plaintiff's contract, upon which he can, and should sue in his own name. Such proof is admissible under the complaint as framed, and, if made, will sustain the averment. This ground of demurrer was not well taken.

The judgment of the circuit court is reversed, and the cause remanded.

## Abbott, Downing & Co. v. Gillespy.

### *Action against Sheriff and Sureties on Official Bond for Failure to make Money on Execution.*

1. *Action against sheriff for failure to make money on execution ; measure of damages.*—In an action against a sheriff and the sureties on his official bond for failing to make the money on an execution, the actual injury sustained is, in the absence of statutory regulation, the measure of damages ; and hence, it is competent for the defendants to show that the plaintiff has sustained no injury.

2. *Same ; what may be shown in defense.*—It is competent for the defendants, in defense of such an action, to show that the defendant in execution had no property subject to levy and sale under execution at law ; or that his property was encumbered by mortgage or other lien, of the existence of which the plaintiff was chargeable with notice.

3. *Same ; when prior execution no defense.*—But it is no defense to such an action, that the sheriff had in his hands another and prior execution against the debtor, unless that execution had been actually levied.

4. *Same ; failure to levy on exempt property.*—While the statute does not make it the absolute and imperative duty of a sheriff to levy upon exempt property, where the debtor has failed to file his declaration and claim in the office of the probate judge, it is the safer policy for him to make the levy, thereby enabling the creditor to contest the claim of exemption under the provisions of the statute, as, on his failure or refusal to levy upon such property, when shown to have been in the debtor's possession, he assumes the burden of proving that it was in fact exempt.

5. *Same ; admissibility of evidence.*—A sheriff, in an action against him for failing to make the money on execution, may testify as a witness for himself, that he made diligent search for property belonging to the defendant in execution, and found none ; but he can not testify that he returned several executions against such defendant "no property found," unless he first lays a proper predicate for the introduction of secondary evidence of the existence and contents of the executions.

6. *Same ; proof of insolvency.*—The insolvency of the defendant in execution, in such case, can not be testified to as a collective fact, it being a legal conclusion deducible from facts and circumstances in evidence ; but it may be shown by evidence of the issue of executions on other judgments against the defendant in execution, and of the returns thereon of "no property found."

7. *Same ; what no defense.*—It is no defense to an action against a sheriff for failing to make the money on execution, that he declined to levy on property in the possession of the execution debtor, because he honestly believed that it was exempt ; and hence, evidence of that fact is inadmissible for him.

8. *Same ; when claim of exemption admissible for sheriff.*—In such action, a claim of exemption, properly verified and filed in office of probate judge after the issue of the execution, but before any levy is made, by the defendant in execution, covering all the property found in his possession, is competent evidence for the defendant ; as such claim is made by statute *prima facie* evidence of its correctness as against the debtor's creditors.

[Abbott, Downing & Co. v. Gillespy.]

APPEAL from Talladega Circuit Court.

Tried before Hon. LEROY F. BOX.

Abbott, Downing & Co., a partnership, brought this action against James Gillespy and others, to recover damages for the alleged breach of the condition of the official bond of the defendant Gillespy, as sheriff of Talladega county (the other defendants being his sureties thereon), in negligently failing to make the money on divers writs of execution issued on a judgment recovered by the plaintiffs in the circuit court of said county on 26th October, 1876, against James W. McMillan. The defendants' plea was, in substance, the general issue, and on issue joined on that plea the cause was tried, the trial resulting in a verdict and judgment for the defendants.

The plaintiffs proved the recovery of their judgment against McMillan, as averred in their complaint, the election of the defendant Gillespy as sheriff on 6th August, 1877, the execution of his official bond on 21st August, 1877, and his continuance in office during the term for which he was elected. It was also shown that prior to, and during the said Gillespy's term of office, executions were regularly issued on said judgment from term to term; that the executions issued thereon during his term were placed in his hands, and by him returned "no property found;" that in 1878, 1879 and 1880, while the said Gillespy, as such sheriff, had in his hands executions on said judgment, the said McMillan "owned and had in his possession personal property, including a growing crop," valued at from \$1,700 to \$2,000; that on several occasions when said executions were in the hands of the said Gillespy, the plaintiffs' attorney notified him "where said property was, and of what it consisted," and directed him to levy thereon, "which he declined to do;" and that the said McMillan, during said years, also owned and resided on a tract of land containing about twenty-two acres, and adjoining the town of Talladega, of the value of \$1,500.

The evidence introduced on behalf of the defendants showed that, at the spring term, 1876, of said circuit court (the term preceding plaintiffs' recovery against McMillan), one Cruikshanks, as administrator of the estate of W. Y. Hendrick, deceased, recovered a judgment against James W. McMillan for \$5848.53 and costs of suit, and that executions were duly and regularly issued on said judgment from term to term, from the time of its rendition until after the term of office of the said Gillespy, as sheriff, had expired, which were returned "no property found." Their testimony tended to show further, that the twenty-two acres of land which said McMillan owned, referred to in the plaintiffs' evidence, was, during the term of office of the said Gillespy, exempt to him as a homestead;



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that he owned no other real estate, but rented other lands during each of the years in which said Gillespy had in his hands executions against him, which he cultivated, and on which he raised the crops referred to in the plaintiffs' evidence; that to enable him to make said crops, he obtained, during each of said years, "large advances of money" from his landlord; and that "at no time while the said Gillespy held the office of sheriff as aforesaid, did the personal property owned by said James W. McMillan, including the crops, growing or gathered, belonging to said McMillan, exceed in value the sum of \$1000."

On cross-examination of John F. Warwick, a witness examined on behalf of the plaintiffs, and who appears to have been Gillespy's predecessor in office, the defendants asked the witness whether he had not had executions against the said McMillan in his hands during the time he was sheriff, which had been by him returned "no property found." To this question the plaintiffs objected, but their objection was overruled, and they excepted. The witness answered that while he was sheriff, he received and returned executions against the said McMillan "no property found." To this answer the plaintiffs objected, but their objection was overruled, and they excepted. This witness, in response to a question asked him by the defendants, having testified that he was acquainted with the financial condition of the said McMillan during the terms of office of himself and of the said Gillespy, the defendants asked him to state whether the said McMillan was, during that time, solvent or insolvent. The plaintiffs objected to this question, but their objection was overruled, and they excepted. The witness answered that, during said time, the said McMillan was insolvent; and the plaintiffs excepted to this answer.

The said Gillespy was examined as a witness on behalf of the defendants, who testified that "during the time the executions in favor of the plaintiffs against James W. McMillan were in the hands of the witness as sheriff, and at the different times when the attorney of the plaintiffs pointed out the growing crop and other property of McMillan to be levied on, he honestly believed that the property was not subject to levy or sale, and for this reason he declined to levy the executions." To this testimony the plaintiffs objected, but their objection was overruled, and they excepted. This witness further testified that about 21st November, 1879, when he had executions in his hands against the said McMillan in favor of the plaintiffs and the said Cruikshanks, as administrator, he called on McMillan, and informed him that he had an execution in favor of the plaintiffs against him, and that the plaintiffs' attorney had pointed out his property to be levied on, and that witness

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would have to levy the executions, "unless he rendered a schedule of his property, and claimed what he was entitled to claim as exempt from sale under execution." To this evidence the plaintiffs objected, but their objection was overruled, and they excepted. The defendants were then allowed to read in evidence, against the plaintiffs' objection, a "schedule of property" claimed by the said McMillan as exempt from levy and sale for the payment of debts, which was duly verified by affidavit, and filed in the office of the judge of probate in and for Talladega county, on 21st November, 1879; and to this ruling the plaintiffs excepted. The personal property claimed in this "schedule," which is averred to have been all that the said McMillan then owned, is therein valued at \$992; and the homestead therein claimed is valued at \$1500.

The court charged the jury, *ex mero motu*, among other things, in substance, as follows: (1) That if the jury believed from the evidence that levies of the executions in the plaintiffs' favor against James W. McMillan, if made by the defendant Gillespy, while they were in his hands as sheriff, would have been fruitless, the plaintiffs were not entitled to recover. (2) That if the jury believed from the evidence, that at the time when the defendant Gillespy had in his hands, as sheriff, an execution against the said McMillan in favor of the plaintiffs, he also had in his hands an execution issued on the judgment recovered by the said Cruikshanks, as administrator of the estate of W. Y. Hendrick, deceased, against the said McMillan; and that if plaintiffs' execution had been levied on McMillan's property, and the property so levied on had been sold thereunder; and that the proceeds of sale would have been successfully claimed and applied to the said execution in favor of the said Cruikshanks, as administrator, etc.; and that thereby the levy would have been fruitless as to the plaintiffs, the plaintiffs were not entitled to recover. (3) That if the jury believed from the evidence, that if the defendant Gillespy had levied either of the executions in plaintiffs' favor upon the property of the said McMillan, and that the latter would have, in such an event, claimed the property levied on as exempt, and would have successfully maintained his claim, on a contest thereof, the plaintiffs were not entitled to recover. To these charges, and to others given at the defendants' request, not necessary to be set out in this report, as they raise the same questions, the plaintiffs duly excepted.

The rulings above noted are here assigned as error.

JOHN T. HEFLIN, for appellants. (1) It is not competent for a witness to testify to the insolvency of a person as a fact. Insolvency is a legal conclusion, to be drawn from facts and cir-

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cumstances in evidence.—*Lawson v. Orear*, 7 Ala. 786; *Brice & Co. v. Lide*, 30 Ala. 647; *Nuckolls v. Pinkston*, 38 Ala. 618. (2) The objection to the testimony of Warwick, that he had returned executions against McMillan “no property found,” should have been sustained. That was not legitimate evidence of insolvency; in was *res inter alios acta*. Besides, the sheriff is as much bound to levy on the property of a defendant in execution who is insolvent, as he would be, if he were solvent.; There being no specific exemptions, and no schedule filed as provided by statute, to claim property as exempt from levy, the sheriff is bound to levy the execution, as he can not know in advance of a levy, that the execution debtor will claim his exemptions in the event of a levy.—*Rottenberry v. Pipes*, 53 Ala. 447; *Sheffey v. Davis*, 60 Ala. 548; *Whitsett v. Slater*, 23 Ala. 626. (3) The sheriff’s belief that property is not subject to levy and sale under execution, was improperly admitted in evidence. His belief was a mistake of law, for which he must suffer the consequences.—*Jones v. Watkins*, 1 Stew. 81; *Gwynn v. Hamilton*, 29 Ala. 233. (4) The schedule of exemptions read in evidence was *res inter alios acta*. No notice of it was ever given to the plaintiff. The liability of the sheriff had accrued before it was filed; and it could have no retroactive effect. The sheriff also procured the filing of this paper in his own wrong, and it is no protection to him.—Code of 1876, §§ 2828 *et seq.*; *Ib.* §§ 2834 *et seq.* (5) The first charge given by the court, *ex mero motu*, was erroneous. It was the duty of the sheriff to levy the executions, and the existence of the hypothesis contained in the charge does not justify or excuse the sheriff in returning the plaintiffs’ executions “no property found.”—*Smith v. Hogan*, 4 Ala. 93; *Bell v. King*, 8 Port. 147.

JNO. B. KNOX, *contra*. (1) The measure of plaintiffs’ recovery was limited to the damage sustained.—*Gay v. Burgess*, 59 Ala. 575. When it is clearly shown that a levy, if made, would have been fruitless, the failure to make such levy does not operate to plaintiffs’ injury. The sheriff is not required to do a useless thing; and if it appear that the defendant in execution was wholly insolvent, and that a levy, if made, would have been unproductive, he is not liable for failing to make the levy.—*Wilson v. Strobach*, 59 Ala. 488. (2) Any evidence of McMillan’s insolvency was competent for the sheriff; and the evidence objected to in this case was to that effect. In *Wilson v. Strobach*, *supra*, a witness was permitted to testify that the firm of Collins & Ramsey was insolvent. (3) The claim of exemptions was competent for the sheriff upon the issue of insolvency.—*Block v. Bragg*, 68 Ala. 291.



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SOMERVILLE, J.—The action is one claiming damages against the sheriff and his sureties, for his failure to make the money on an execution in favor of the plaintiff, against one James W. McMillan. The gravamen of the action is the alleged negligence of the sheriff in failing to levy upon and sell the property of the defendant in execution, which was subject to levy and sale.

In actions of this nature, the general rule as to damages, in the absence of statutory regulation, is, that the amount to be recovered must be commensurate with the extent of the injury suffered by reason of the sheriff's unintentional default or breach of duty. The actual injury sustained by the plaintiff is, in other words, the measure of his damages.—2 Greenl. Ev. § 599; *Gay v. Burgess*, 59 Ala. 575; *Sedgwick on Dam.* 634.

Hence, it is plainly competent for the defendant to show that the plaintiff has not been damnified—that he has sustained no damage for which he can justly claim compensation. This can be done by any legal proof showing that the defendant in execution was totally insolvent, in the sense that he owned no property which was liable by law to be levied on and sold for the payment of the particular debt reduced to judgment, upon which the execution was issued. If the defendant in execution owns no property except such as is exempt from levy and sale, any effort by the officer to execute the writ may properly be deemed to be fruitless and unproductive of benefit to the plaintiff. The officer is excused because the law does not exact of him the doing of a useless thing.—*Wilson v. Strobach*, 59 Ala. 488; *Bell v. King*, 8 Port. 147 (5 Smith's Cond. Rep. 221).

So, if the personal property of the judgment debtor is encumbered by a mortgage or landlord's lien for rent, or other lien, of the existence of which the plaintiff was chargeable with notice, and the amount of such encumbrance is shown to be in excess of the value of the property, it is equally manifest that no injury has been sustained, because a sale of the property would have realized nothing which could be applied in satisfaction of the judgment debt.—*Wilson v. Strobach*, *supra*; 2 Greenl. Ev. § 585; *Smith v. Hogan*, 4 Ala. 98.

It is, nevertheless, the settled law in this State, that where a sheriff has two executions in his hands, the lien of the one being superior to that of the other, in an action against him for failing to make the money on the junior execution, he can not protect himself under a return of *nulla bona* upon it, by showing the existence of the superior lien, unless the execution creating it was *actually levied*. This principle was declared in *Bell v. King*, 8 Port. 147, *supra*, more than forty years ago, when it was said by the court: "It can not be endured that a

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sheriff shall be allowed to excuse himself from one neglect of duty by interposing another." The rule would obviously be otherwise, under the principle last announced, where both executions had been simultaneously levied, or where there had been a levy of the older one.—*Smith v. Hogan*, 4 Ala. 97, 98.

The Code prescribes the manner in which a claim to property exemptions may be asserted. It may be done, in the first place, prior to any levy upon the property, or attempt to subject it to legal process. This is by written "declaration and claim," stating the property selected as exempt by proper description, signed by the owner, and verified by his oath.—Code, 1876, § 2828.

Where such declaration and claim are made and filed for record in the office of the probate judge in the county in which the property is situated, neither the sheriff nor any constable is permitted to levy an execution or other legal process upon it, unless the debtor's right to such exemption is contested by affidavit, denying its validity in the manner prescribed by section 2830 of the Code, and the bond, with sufficient security, as therein required, is first executed and approved by the levying officer.—Code, §§ 2830, 2828.

If no such declaration or claim of exemption, however, has been filed for record, it is especially provided by the statute that "no action shall lie against the officer *making the levy*, by reason that the property levied on is *exempt* to the defendant, or his family under the Constitution or laws of the State." Code, § 2833. The officer may, in other words, make the levy and force a claim of exemption to be lodged with him, which may be contested by the plaintiff in execution, as provided for by section 2834 of the Code.

We can see nothing in the statute which makes it the absolute and imperative duty of the sheriff to levy upon exempt property, where the debtor has failed to file his declaration and claim in the probate office. *Prima facie*, it may be said, perhaps, to be his duty to do so, as it is competent for the debtor to waive a privilege by refusing to assert his right of exemption.—*Gresham v. Walker*, 10 Ala. 370. But on this point, prior to our present system of statutory procedure regulating the subject, our decisions can not be said to be harmonious. *Renfro v. Heard*, 14 Ala. 23; *State v. Johnson*, 12 Ala. 840. It would certainly be the safer policy for the sheriff to make the levy, and more just to the execution creditor, because it enables him to contest the claim of exemption in a course of procedure prescribed with great accuracy of detail by the statute.—Code, §§ 2834, 2830. However this may be, it is very well settled, that, where a sheriff has legal process in his hands against a defendant, and fails to levy it upon property

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shown to be in his, the defendant's, possession, or having levied it, discharges the levy without selling, the *onus* is shifted upon the sheriff to show a legal excuse for not levying or selling, as the case may be.—*Wilson v. Brown*, 58 Ala. 62, and authorities cited, p. 64; *Whitsett v. Slater*, 23 Ala. 626.

The foregoing principles are sufficient to determine this cause upon another trial, which must be ordered for several erroneous rulings on the evidence.

It was error to permit the witness, Warwick, to testify that he, as sheriff, during his term of office, had returned sundry executions against McMillan, "no property found." No excuse was given for not proving this fact by the record, or a certified copy of it, as the legal effect of the evidence was to prove both the existence and contents of these executions. It is not the same thing as stating that, when sheriff, the witness made diligent search for property belonging to defendant and found none—a fact which it was permissible for him to prove. *Childs v. The State*, 55 Ala. 28; *Hames v. Brownlee*, 71 Ala. 132.

Nor should the court have permitted the same witness to be asked whether McMillan was solvent or insolvent. Insolvency is a legal conclusion following from certain facts and circumstances, from which it may be inferred. It can not be testified to as a collective fact. The circumstances or facts from which it is deducible must be proved.—*Brice v. Lide*, 30 Ala. 647; *Nuckolls v. Pinkston*, 38 Ala. 615.

It was competent to be proved, however, by evidence of executions issued on other judgments against McMillan, with the return of "no property found," and the court did not err in permitting this to be done.—*Loeb v. Peters*, 63 Ala. 243.

It was no defense for the sheriff that he declined to levy upon property in the possession of the execution debtor, because he honestly believed it to be exempt. When the property was pointed out to him by the plaintiffs' attorney, and he declined to levy upon it, he acted at his own peril. He was *prima facie* liable to the plaintiffs for the just value of such property, not exceeding the injury sustained, without regard to his motive in refusing to execute the writ according to its mandate. He could only protect himself by proving satisfactorily that the property so pointed out was exempt from levy and sale under legal process, or that it was so encumbered with liens as to render a levy upon it fruitless and unproductive of any benefit to the plaintiffs.

There was no error in admitting in evidence McMillan's schedule of exemptions, which he had prepared in conformity to the requirements of the statute, before any levy upon his property. Such "declaration and claim," properly prepared, verified and filed for record, is made by statute to be *prima*



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*facie* evidence of its correctness as against all the creditors of the claimant.—Code, 1876, § 2831.

The judgment must be reversed and the cause remanded.

## Warren v. Wagner.

### *Action on Promissory Note.*

1. *Married woman relieved of disabilities of coverture; capacity to make lease of lands.*—A married woman who has been relieved of the disabilities of coverture under the statute (Code, 1876, § 2731), has the capacity, in conjunction with her husband, to make a valid lease of lands belonging to her, as her statutory estate, for a term of years.

2. *Same; when may sue alone for rent of lands.*—Where a married woman who has been relieved of the disabilities of coverture under the statute (Code, 1876, § 2731), executed, in conjunction with her husband, a lease of lands belonging to her as her statutory separate estate, for a term of years, and, by the terms of the lease, the rent was made payable to her, she may sue alone for the recovery of the rent.

3. *Admissibility of evidence.*—When evidence is offered as a whole, parts of which are inadmissible, the primary court may, without error, exclude the whole.

4. *Lease; when lessee not bound to repair or rebuild.*—An express stipulation in a lease, binding the lessee to surrender the premises, at the expiration of the term, “in as good order and condition as the same now are, reasonable use and wear and tear excepted,” is merely the expression of an obligation which the law would imply in its absence, and does not impose upon the lessee a liability to repair or to restore, in the event of a destruction of the premises, or a material part thereof, during the term, by fire, or other unavoidable accident.

5. *Motion to exclude illegal evidence; when may be made.*—A motion for the exclusion of evidence, which is not merely secondary, but in itself illegal or irrelevant, may be entertained at any stage of the cause prior to the retirement of the jury.

6. *Liability of lessee for rent in event of destruction of premises; exception to general rule.*—A lessee of premises destroyed during the term by unavoidable accident is not excused from the performance of an express provision or covenant to pay rent for the term, unless he has protected himself by an express stipulation for the cessation of rent in that event, or the landlord has covenanted to repair or rebuild; but there is an exception to this general rule, that the destruction must not be of the entire subject-matter of the lease, leaving nothing capable of holding and enjoyment by the lessee.

7. *Same.*—Where the lease is of lands and tenements, with the right of quarrying stone during the term, a destruction of a limekiln located on the lands does not excuse the lessee from payment of the rent for the balance of the term, although the use of the kiln may have been the principal consideration moving the lessee to enter into the lease, and from it he may have expected to have derived his principal profits.

8. *Ejection of tenant; what constitutes, and what are its effects.*—The eviction of a tenant consists in the disturbance of his possession, his expulsion or amotion, by title paramount, or by the entry and act of the landlord, depriving him of the enjoyment of the demised premises, or a

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portion thereof, and operating, partially or wholly, a bar to the right of the landlord to demand rent falling due in the future.

9. *Same; mere trespass by landlord does not amount to.*—A mere trespass by the landlord upon the demised premises, not intended by him as a permanent amotion or expulsion of the tenant, or to deprive him of the possession and enjoyment of the premises, may entitle the tenant to damages, but does not amount to an eviction.

10. *Same; when partial and when entire; effect on rents due in future.* If the landlord, by himself, or by the act of another, which he authorized, or to which he assents, enters upon, and takes possession of a material portion of the demised premises, the entry and possession constitute, at the election of the tenant, an eviction from the whole, authorizing an abandonment of the lease, and absolving the tenant from the payment of rent falling due in the future, or a partial eviction only, discharging the rent *pro tanto*. Nothing, however, less than an entire abandonment or surrender will operate a dissolution of the tenancy, and a suspension or discharge of the whole rent.

11. *Same; refusal to restore no element of eviction.*—When the landlord enters upon, and takes possession of the demised premises, there is no duty resting upon the tenant to demand of the landlord restoration, and, of consequence, there can be no necessity for a refusal to restore, as an element of eviction.

12. *Same; proof of consent or authority of the wife, when effected by husband.*—When the act of the husband is relied on as an eviction of the wife's tenant, his agency, or her assent to his act may be proved by circumstantial evidence, and may be inferred from his employment in the transaction of her business, her acquiescence in his former acts in reference to the leasing of the premises, their relationship, and the nature and character of the act imputed to him; the inference, however in such case, is one of fact, to be drawn by the jury, and not one of law.

### APPEAL from Shelby Circuit Court.

Tried before Hon. S. H. SPROTT.

This was an action by Mrs. Mary B. Wagner against B. B. Warren, on two promissory notes, each for \$80, dated 13th April, 1878, and payable to the plaintiff's order, one on 1st December, 1880, and the other on 1st January, 1881; and was commenced on 28th January, 1881. The defendant filed six pleas. The averments of the first plea are, in substance, that the plaintiff is, and was on 29th August, 1877, a married woman, the wife of Charles G. Wagner; that at the date last named she was, by the chancellor's decree, duly relieved of the disabilities of coverture to the extent, and in the manner authorized by the statute; that on 13th April, 1878, the plaintiff, her husband and the defendant executed a lease, a copy of which is exhibited with the plea; and that the notes sued on were, with others, given for the rent of the property embraced in the lease. As shown by the lease, the demised premises consisted of a certain "piece, parcel, or lot of land," in Shelby county, in this State, "together with the limekiln and mill-house attached, and all and every building whatever, to the said lot of land in any wise appertaining and belonging, including the six cabins now used and occupied by the workmen,"

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and certain machinery, tools, etc.; and also the right to quarry rock and to cut and use timber for the purpose of making lime at the kiln. The lease was for the term of three years, and the rent was payable to the plaintiff in monthly installments of eighty dollars each, evidenced by defendant's promissory notes. The other provisions of the lease material to this report are stated in the opinion. The defenses set up in the other pleas may be briefly stated as follows: (2) Want of consideration; (3) Failure of consideration; (4) *Non-assumpsit*; (5) That the defendant was induced to execute the lease by false representations touching his liability in the event any of the property was destroyed by fire, without fault on his part, made by plaintiff's husband, who acted as her agent in the matter, and who was a lawyer in whom the defendant had a "peculiar trust and confidence;" and (6) Defendant's eviction from the premises by plaintiff, she acting by and through her husband and agent. To the first plea the plaintiff demurred, and her demurrer was sustained. The cause was then tried on issues joined on the other pleas, the trial resulting in a verdict and judgment for the plaintiff.

On the trial the plaintiff introduced the notes sued on in evidence, and rested his case. Thereupon, the defendant read in evidence the lease exhibited with his first plea, and introduced proof showing that the limekiln and machinery described in the lease were destroyed by fire in June, 1880; that the consideration of the notes sued on was rent under the lease for months subsequent to the fire; and that Charles G. Wagner, plaintiff's husband, drafted the lease, and acted for, and represented her in the negotiations for it, and in procuring its execution by the defendant. The defendant was examined as a witness in his own behalf, and his testimony, which is set out at length in the bill of exceptions, may be summarized as follows: The negotiations for the lease were had with the plaintiff's husband, who was a lawyer by profession, friendly to the defendant, and in whom he had confidence, etc. In the spring of 1878, when he first spoke to the said Charles G. Wagner about renting the property, the latter told him that he could rent it, unless one T. G. Holt, with whom he was then negotiating for a lease of the property, should take it. A few days afterwards, the said Wagner sent for defendant, and told him he would not rent to Holt, and that defendant could have the place on the same terms on which it had been offered to Holt; and that he had prepared a lease for Holt with great care and trouble, which he would read to defendant. He then read the lease to defendant, and when, in reading, he came to the clause (set out in the opinion) providing that the property should be returned at the end of the term in as good condition



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as it then was, with the exception of the ordinary wear and tear, he remarked that Holt had objected to this clause on the ground that the property might be destroyed by fire, or other cause, and that he, Holt, would be held responsible; and, in this connection, he also said to defendant that "if the property was destroyed, there would be an end to the whole matter, unless done through the negligence of the tenant;" and that he had satisfied Holt on this point, but that they disagreed as to other matters. Defendant, relying on the construction and explanations of the lease made to him by the said Wagner, executed the lease; but, before doing so, he carried it home, and read it over carefully, and had a talk with Holt about it. The defendant further testified that he would not have signed the lease and the notes, if it had not been for said construction and explanations of it; that he complied with the terms of the lease, and paid the rent promptly, until the fire, including the installment which matured in June, 1880; that shortly after the fire he, having heard that said Wagner intended to try to make him responsible for the rent and the property destroyed by the fire, made a written tender to him of all the property not destroyed by the fire, and afterwards failed and refused to pay the rent accruing under the lease; that he did not use the houses on the premises after he discovered the extent of the destruction of the limekiln property by the fire, except a stable and buggy shed, which he used occasionally for a few months after the fire; that "the fire utterly destroyed the entire value of the property as limekiln property, the only use for which it was valuable, or for which it was rented, but left the stables, crib and a good many houses that were used for the hands at the limekiln, on the premises uninjured." The evidence introduced on behalf of the defendant further tended to show that the fire was not caused by his negligence or fault; that a short time after the fire the said Charles G. Wagner "caused a colored woman, the cook of said Wagner and family, to be put in one of the houses included in the lease, and ordinarily used by the employees at the limekiln;" and that a few days after the fire the said Wagner also caused to be removed from the leased premises a few designated articles of personal property, included in the lease, to his dwelling.

T. G. Holt was examined as a witness on behalf of the defendant, and he testified that the lease in evidence was "the same, in substance, as the draft of a lease which had been offered for his acceptance by said Wagner some few days or weeks before the date of the lease;" and that a few days after witness had refused to rent, and before the defendant had signed the lease, he had a conversation with defendant in reference to it. "Thereupon the defendant offered to prove by

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said Holt that in said conversation Holt informed witness that, whilst the said offer by said C. G. Wagner to Holt of a lease, according to the terms of the said draft above referred to, was pending, Holt objected to the provisions in the said draft to the effect, that the leased premises and property, at the end of the lease, should be returned to the lessor in as good order and condition as the same were at the time of making the lease, reasonable use and wear thereof excepted; and that the said C. G. Wagner removed this objection by convincing Holt, by assertions and argument, that said provision would not impose any liability upon the tenant for any of the leased premises or property destroyed by fire, or other like cause during the term, without the negligence of the tenant; and that the tenant would only be liable for such property as was destroyed by his negligence." The court refused to allow the defendant to make this proof, and to this ruling he excepted.

After the defendant had closed his testimony, the court, on motion of the plaintiff, excluded from the jury the testimony of the defendant touching what Wagner had said to him as to the legal effect and operation of the clause in the lease, providing that the property should be returned at the end of the term in as good condition as it then was, with the exception of the ordinary wear and tear; and also that portion of his testimony in which he stated that he believed what said Wagner said to him in relation to such legal effect and operation, and that he would not have signed the same and the notes, if it had not been for the construction and explanation of the lease, made by said Wagner. To this ruling the defendant excepted.

The plaintiff then introduced evidence, in rebuttal, tending to show that he never placed his cook in any house on the leased premises, before or after the fire, and that he never authorized any one else to do so for him; that, during the term of the lease, he never interfered in any way with any of the personal property embraced in the lease; but, on the contrary, he constantly refused to interfere with, or exercise any control over any of said property, real or personal, until after the termination of the lease, on 13th April, 1881; and that "none of the personal property delivered to defendant Warren under the lease was ever returned by him." As recited in the bill of exceptions, "it was admitted by both parties on the trial of the cause, as evidence in the cause, that the plaintiff had been continuously the wife of said Charles G. Wagner from a time anterior to 1875 down to the present time, and that the plaintiff, in 1876, became the owner of a statutory separate estate, including the aforementioned leased premises and property." The decree relieving the plaintiff from the disabilities of cov-

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erture, and the other proceedings relating thereto, were also read in evidence.

The court charged the jury, *ex mero motu*, among other things, as follows: 1. "If the destruction by fire of the leased premises, proved in this case, was not an entire destruction of such premises so leased, then there is not a failure of consideration." 2. "If the plaintiff, or her duly authorized agent took possession of some of the leased property after the fire, in June, 1880, and the defendant knew this, and did not object, but remained in possession of the leased property not destroyed by fire, except that in possession of plaintiff, and long after this continued in possession of the same, and without any objection to such possession on the part of the plaintiff, then the jury could look to this as an implied assent on the part of the defendant to such possession." To each of these charges the defendant duly excepted, and also to the following charges given at the request of the plaintiff: 3. "Although the jury may believe that Mr. Wagner, the husband of plaintiff, ordered his cook to be moved into one of the houses on the leased premises, yet, unless they also find from the evidence that Mr. Wagner was, in doing that act, acting as the agent of his wife, or was authorized by her to do it, or did it with her consent, then that act would not be an eviction; and they must find a verdict for the plaintiff for the amount of the notes sued on and interest." 4. "Although the jury may believe from the evidence that Mr. Wagner put one of his servants in the possession of one of the houses on the leased premises, yet, if they also believe from the evidence that Mr. Warren knew that such servant was occupying such house, and, after knowing that, kept a horse or horses in the stable on the leased premises, and kept a part of the personal property leased, then he can not set up an eviction as a defense in this case; and the jury must find a verdict for the plaintiff for the amount of the notes sued on, with interest thereon." 5. "The burden of proving an eviction of Warren by Wagner from the premises leased is upon Warren; and, unless the testimony offered by him upon that question is satisfactory to the minds of the jury, that Mrs. Wagner, the plaintiff in this cause, did actually evict Warren from the premises, by taking possession thereof, and denying and refusing Warren the right to use or occupy said premises under the lease, then they must find for the plaintiff."

The defendant also duly reserved exceptions to the refusal of the court to give the following charges requested by him in writing: 1. In substance, that if the subject of the lease was substantially destroyed by fire in June, 1880, without the fault or negligence of the defendant, if that destruction went to the extent of rendering the leased premises without value for the



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only purpose for which they were leased, the plaintiff is not entitled to recover. 2. "If the jury believe all the evidence in this case, the plaintiff is not entitled to a verdict." 5. In substance, that if there had been a total failure of the consideration for the notes sued on, the plaintiff is not entitled to recover. 7. "The authority of Charles G. Wagner to act for his wife in the matter of the leased property need not be proved by positive evidence, if the jury believe, from all the facts and circumstances which have been proved to the satisfaction of the jury, that he was authorized to act for his wife." 8. "The authority of Charles G. Wagner, as the agent of the plaintiff, Mary B. Wagner, may be implied from his previous employment in similar acts, or from subsequent acquiescence, and by circumstantial evidence."

The rulings above noted are here assigned as error.

RICE & WILEY, for appellant. (1) A married woman can not make a valid lease of her estate, and become entitled to sue for, and recover the rents, issues and profits thereof, by virtue of a decree rendered by the chancellor, duly made under section 2731 of the Code of 1876, relieving her of the disabilities of coverture, "so far as to invest" her with "the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *feme sole*." Such decree fixes and establishes her condition, *status* and rights, by the affirmative description or enumeration of her rights. This affirmative description or enumeration must be construed *negatively* as to all rights not enumerated or affirmatively described. This rule of construction as to such affirmative description or enumeration is universally applicable. See cases cited in note to *Ex parte Vallandigham*, 1 Wall. 252. A like rule is uniformly applied by this court in construing our statutory provisions as to the capacities of married women in respect to their estate. Every such statutory provision is uniformly held to be "narrowly enabling;" and not to give to such married women any right not expressed in so many words, or by inevitable implication.—*Shulman v. Fitzpatrick*, 62 Ala. 571; *Drefus v. Wolffe*, 65 Ala. 496. The word "convey" is sometimes used as a *generic* term, and is, therefore, broad enough to embrace a mortgage, lease, and every other *species* of conveyance; but that it was not used in any such generic sense in the statute under consideration, is demonstrated by the fact, that the legislature used, not only the word "convey," but also the word "mortgage." It is a general and reasonable rule, that more general words shall be restrained by other expressions more limited in the same instrument.—*Hailey v. Falconer*, 32 Ala. 539, and authorities there cited. Even if it were conceded that

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a lease is a *sale* of an interest in land, it would by no means follow, that the word *sell*, as used in said statute, was used in its broad and generic sense, and, therefore, included the right to make the lease. An administrator of an insolvent estate was authorized to *sell*; yet he could not lease; and so it is with a married woman.—*Long v. McDougald*, 23 Ala. 413. (2) As to the admissibility of the evidence tending to show that the lease was procured by false representations, see 10 Searg. & Rawle, 290; 6 *Ib.* 471; 16 *Ib.* 424; 1 *Ib.* 464; 6 Wharton, 303; *Dixon v. Barclay*, 22 Ala. 370. (3) “The charges given by the court, *ex mero motu*, and the charges given at request of plaintiff, severally call for a reversal of the judgment. They are severally manifestly erroneous. And so it is of each refusal to charge as asked by defendant”

TROY & TOMPKINS and WILSON & WILSON, *contra*. (1) Both before and after the removal of the disabilities of coverture under the statute, husband and wife can execute a valid lease of lands belonging to the wife as her statutory separate estate. Such a power is clearly contemplated by section 2706 of the Code of 1876; and any other construction would make the law an absurdity; it would require them to use and occupy such property themselves, or lose the use of it. Again, that section gives the husband the *rents* of the wife's property, thus clearly contemplating that such a thing as rents might accrue from such property. The well accepted definition of rents is “a yearly profit in money, provisions, chattels, or labor, issuing out of lands and tenements, in retribution for its use.” Hence, rents can not exist, unless there is a lease, express or implied, a parting with the use of the lands.—3 Kent's Com. 460. Section 2707 of the Code gives the husband and wife jointly, and section 2731 gives the wife alone, power to sell and convey her property, the latter section conferring the power on her as if she was a *feme sole*. A sale may be defined as an agreement by which one person parts with property, or with an interest in property, and the title thereto, and receives therefor a price in money. This is recognized both by statute and authority. Code, 1876, § 2121, subd. 5; *Riddle v. Brown*, 20 Ala. 412; *Ricks v. Dillahunt*, 8 Port. 140–1; *Stockwell v. Hunter*, 45 Am. Dec. 222. A parting with a term of years in land is a sale of an interest in such land. “A lease is properly a conveyance of any lands or tenements, made for life, for years, or at will;” and it may be made by any person seized of any estate in the lands, the only qualification being, that the term can not endure longer than the estate of the lessor.—2 Black. Com. 318; 4 Kent's Com. 106; 1 Bright's Hus. & Wife, 194; 2 Bou. Law Dic. title, “Lease;” *Pickett v. Buckner*, 45 Miss. 226;

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*Jones v. Marks*, 47 Cal. 243. Counsel for appellant seem to misconceive the opinion of this court on the power of a married woman who has been relieved of the disabilities of coverture. The true rule, as settled by these decisions, is this: She has no powers except such as are given by statute, namely, to buy, sell, hold, convey and mortgage real and personal property; but in the exercise of these powers, she may do any thing that a *feme sole* could do. She can make any sale or conveyance that any other person can make, though she may not be able to bind herself personally.—*Holt v. Agnew*, 67 Ala. 360; *Winn v. Wailes* [not reported]. (2) There was no error in excluding the testimony of Warren as to Wagner's statements to him touching the legal effect and operation of the lease. *Townsend v. Cowles*, 31 Ala. 437; s. c. 37 Ala. 77; *Kerr on Fraud & Mis.* 90; 2 Chitty on Con. 1041; *Starr v. Bennett*, 5 Hill, 303; *Platt v. Scott*, 6 Black. 389; *Russell v. Branham*, 8 *Ib.* 277; 9 Ind. 488; 33 Ill. 238; 2 Dev. Eq. 393; 16 Ala. 789; 3 Stew. 451. (3) The leased property consisted of the limekiln, various other houses, and about forty acres of land, besides personal property. The destruction of the limekiln before the lease expired had no effect upon defendant's liability for the rent accruing thereafter.—*Chamberlain v. Godfrey*, 50 Ala. 530; *McClellan v. Cook*, Minor, 257; *Linn v. Ross*, 36 Am. Dec. 95; *Hallett v. Wylie*, 3 Am. Dec. 457; *Gates v. Green*, 27 *Ib.* 68. (4) There was no evidence whatever of an eviction by Mrs. Wagner. Even if her husband had placed a woman in one of the houses, she could not be affected thereby, as there was no evidence that she had been informed of this, or that she had ever consented to it. He had no power to bind her, his power as trustee having terminated when the decree of the chancellor was rendered in 1877; and the jury would have no right to infer that he was then acting as her agent, from former acts of agency. This was done, if done at all, more than two years after the lease was executed; and between those dates there is no proof of a single act in which Wagner assumed even to act as his wife's agent.—*Holt v. Agnew*, *supra*; 2 Greenl. on Ev. § 64; *Scarborough v. Reynolds*, 12 Ala. 252; *Brunson v. Brooks*, 68 Ala. 248. (5) The principle laid down in *Crommelin v. Thiess & Co.*, 31 Ala. 421, that any act of the landlord, depriving the tenant of the enjoyment of the rented premises to the full extent secured by the lease, is an eviction, and would authorize the tenant to abandon the premises, and thereby exonerate himself from liability to pay rent, but if he fails to abandon, or does any act inconsistent with the right to abandon, he thereby waives the right, is the principle asserted by the charges given on the question of eviction, and is supported by all the authorities.—*Chamberlain v.*



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*Godfrey, supra. Rice v. Dudley*, 65 Ala. 70; Bou. Law Dic. title, "Eviction."

BRICKELL, C. J.—A married woman, having a statutory separate estate, is relieved of the disabilities of coverture by decree of the chancellor, rendered in pursuance of the statute (Code of 1876, § 2731). Subsequently, with the concurrence of her husband, manifested by his joining in the execution of the lease, she leases her lands for a term of years, taking notes payable to herself alone, for the installments of rent as they accrue according to the lease. Two questions are raised upon this state of facts: First, is the lease valid; secondly, can the wife in her own name maintain an action at law for the recovery of the rents as they fall due.

The effect of the statute, and of the decree of the chancellor rendered in conformity to it, has been of frequent consideration in this court; and, as is insisted by counsel for appellant, the statute has been regarded as enabling the wife, as enlarging her capacity to contract, and her capacity to sue and be sued alone, only to the extent, and for the purposes specified. It has not been construed as conferring a capacity to contract generally; nor a capacity of suit, otherwise than as it may result from her contracts or engagements, entered into in the exercise of the right with which she is invested.—*Dreyfus v. Wolfe*, 65 Ala. 496; *Holt v. Agnew*, 67 Ala. 360; *Ashford v. Watkins*, 70 Ala. 156. The right or power with which she is invested, in the words of the statute, is, "to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *feme sole*." Though the right or power to lease lands is not in express words conferred, a construction of the words *sell and convey*, which would not include it, would be exceedingly narrow and illiberal, rendering the statute an abridgment, rather than an enlargement of the power over her lands, which the wife, in conjunction with her husband, could exercise, either at the common law, or under the pre-existing statutes, which disable the husband from taking title to her property of any kind, and confer upon her capacity to hold it as if she were a *feme sole*.

The common law, upon marriage, "without the birth of issue, casts upon the husband an estate in all the wife's real property in possession, whether of inheritance or of freehold for life, during the joint lives of himself and wife."—1 Bish. Mar. Women, § 529. The death of the wife, or the death of the husband terminated the estate. If there was issue born alive of the marriage, capable of inheriting the estate, the estate of the husband endured for his own life. Without the concurrence of the wife, the husband could bargain, sell and

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convey his estate in her lands; and the larger power included the less of leasing them, reserving the rents to himself alone. The term created by the lease could endure only during the continuance of his estate; for the principle of the common law was inflexible, "that no man could grant a lease to continue beyond the period at which his own estate was to determine." 4 Kent, 116. The wife was incapable of leasing her lands, and her lease, like her conveyance in fee, was *void*, not *voidable*, as was the lease of an infant; *void*, not only because the present interest was in the husband, but because coverture disabled her from binding her estate, or binding herself personally. In the absence of statutes authorizing a lease of the lands of the wife by husband and wife jointly, they could join in a lease, and, during the continuance of the estate of the husband, it was valid and operative. Upon the expiration of his estate, the lease was *voidable*, not *void*; the wife surviving, or, in the event of her death her heirs, had the election to affirm or disaffirm it; an acceptance of rent was an affirmance.—1 Bish. Mar. Women, §§ 538-45. Statutes, expressed in general terms, empowering husband and wife to convey her lands, included the power of leasing them; and a lease, executed in the mode prescribed by the statutes, was binding upon the wife, or her heirs, after the death of the husband and the expiration of his estate.—1 Bish. Mar. Women, § 549; *Jackson v. Holloway*, 7 Johns. 81; *George v. Goldsby*, 23 Ala. 326. In *Jackson v. Holloway*, *supra*, said Thompson, J.: "The wife may, during coverture, part with the whole, or any portion of her interest in real estate, if the deed be acknowledged in the mode prescribed by the statute, concerning the proof of deeds. The words of the act are general, extending to any estate of the *feme covert*."

The statute creating and defining the separate estates of married women, and the provisions of the Constitution preserve to the wife the capacity of taking and of holding property, notwithstanding coverture, and operate to deprive the husband of the right he had by the common law of taking and of holding property owned by her at the time of marriage, or to which she subsequently became entitled. In very general terms, it is declared: "The property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them jointly, by instrument of writing, attested by two witnesses." The acknowledgment of the conveyance before an officer authorized to take acknowledgments of conveyances, is the equivalent of an attestation by two witnesses.—Code of 1876, §§ 2707-08. The statute has not been construed as empowering husband and wife to mortgage the estate of the wife; for a power simply to *sell and convey*, does not include a power to mortgage, unless

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there is "something added over and above, showing that the power of sale is not to be taken in its primary sense, but means a power to mortgage."—*Bloomer v. Waldron*, 3 Hill, 361. It is not an absolute, unconditional sale, a sale outright, which is authorized; a conditional sale is equally within the meaning of the statute.—*Peebles v. Stolla*, 57 Ala. 53. A lease is a sale and conveyance of a partial, qualified, limited interest in lands. It is defined as "a species of conveyance for life, for years, or at the will of one of the parties, usually containing a reservation of rent to the lessor."—*Taylor's Land. and Ten.* 314. There can be no good reason assigned for compelling husband and wife to a sale, absolute or conditional, of the entire estate or interest, when a lease for a term, conveying a limited interest, the reversion remaining in the wife, would be more beneficial to them. The lease for a term that may possibly endure beyond the life of husband and wife, may be necessary to preserve the estate from waste, or to make it a source of income. The estate, as is the fact in reference to the premises, the subject of present lease, may be fitted and adapted to uses requiring an outlay of capital, or skill and experience to manage and operate them profitably. Neither husband nor wife may have the skill and experience, or they may not have the capital, or, if they have it, may be unwilling to appropriate it to these uses. The interests of the wife, the preservation of her real estate, will often be best promoted by leasing it, rather than by sale, converting it into some other species of property. All principles of just construction require that the general words of the statute, authorizing a sale and conveyance of the wife's statutory estate, should be interpreted as comprehending a lease, which is a sale and conveyance of a qualified, partial interest, in contradistinction of a sale and conveyance of the entire estate.

Construing the statute investing a married woman relieved of the disabilities of coverture with the right to buy, sell, hold, convey and mortgage real and personal property, as similar statutes are construed, we must hold, that she has capacity, in conjunction with her husband, to make a valid lease of her lands for a term of years. If the statute were not so construed, though its plain purpose is to enable the wife to enlarge her capacity of contracting, and of conveying her property, it would operate an abridgment of a power she could have exercised at common law and under pre-existing statutes. The capacity of the wife to sue and be sued alone is co-extensive with her capacity to contract or convey, as it is defined by the statute. Having authority to make the lease in conjunction with her husband, the rents could properly be reserved to her alone,



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and for them she may sue alone, not joining her husband. The demurrer to the first plea was properly sustained.

It has repeatedly been decided that when a party offers evidence as a whole, parts of which are admissible, and parts inadmissible, the court may, without error, overrule the entire proposition. The duty of separating and distinguishing the admissible from the inadmissible parts can not be cast upon the court without its consent.—1 Brick. Dig. 887, § 1202. There is much of the evidence of the witness Holt, proposed to be introduced, which consists of conversations between himself and the defendant, not parts of the *res gestæ*, and had in the absence, and without the knowledge of the plaintiff. These conversations were plainly inadmissible; if it be, that there are other parts which are admissible, they were not pointed out in the circuit court, and an offer made to introduce them separately.

The representation of the husband, pending the negotiations for the lease, and prior to its execution, seems to have been limited to the legal effect and operation of a particular clause or covenant, and not to the lease taken in its entirety. The clause or covenant to which the representation related, was that by which the lessee stipulates that he would “deliver up the said leased premises, with all the machinery and other things mentioned in the schedule hereunto attached, to the said Mary B. Wagner, her heirs or assigns, and quietly, at the expiration of the said term of three years, in as good order and condition as the same now are, reasonable use and wear and tear excepted.” The representation was, that this clause or covenant did not impose a liability upon the lessee to repair or to restore, if there was by fire, or other unavoidable accident, a destruction of the premises, or a material part thereof, during the term. If the representation was (as we are now bound to regard it) confined to the legal effect of this particular clause, and was without reference to the lease in its entirety, it was not untrue. In all leases it is implied, if it be not expressed, that the lessee will pay the rent as it accrues, will make tenantable repairs, will avoid the exposure of the premises to ruin or destruction by acts of omission or commission, and, on the expiration of the term, will quietly surrender possession. In the absence of an *express covenant*, he is not amenable because of the deterioration of the premises from the ordinary *wear and tear* incident to their reasonable use; nor, if by unavoidable accident, or by the act of God, or by the act of a public enemy, there is injury to, or a destruction of the premises, is he bound to repair or restore. Taylor’s Land. & Ten. § 343; *Nave v. Berry*, 22 Ala. 382; *U. S. v. Bostwick*, 94 U. S. 53; *Warner v. Hitchins*, 5 Barb. 666. A covenant on the part of the lessee, like that we are now con-

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sidering, that, upon the expiration of the term, he will return or surrender possession of the premises in the same condition they were when he entered into possession, the usual or natural wear and tear excepted, is not a covenant to repair or rebuild; it is but the expression of the implied obligation or duty resting upon him.—Authorities *supra*; *Maggort v. Hansbarger*, 8 Leigh, 532; *Howeth v. Anderson*, 25 Texas, 557. In this view, there was no misrepresentation, and the evidence was irrelevant. It is the settled practice to entertain a motion for the exclusion of evidence, which is not merely secondary, but in itself illegal, or irrelevant, at any stage of the cause before the retirement of the jury.—1 Brick. Dig. p. 887, §§ 1190, 1197. Whether the lease taken in its entirety contains any covenant binding the lessee to rebuild or restore, if there was injury to, or destruction of the premises, without fault or neglect on his part, is not a question now presented. If such obligation is imposed, and, as is most probable, the representation of the husband had reference to the lease in its entirety, whether it was the expression of an opinion upon matter of law, as distinguished from the representation of matter of fact; and if it be the representation of matter of law, whether it was not fraudulent, as proceeding from a party having superior means of information, professing a superior knowledge of the law, upon which the lessee relied, in ignorance and in confidence, trusting to the truthfulness of the husband, and thereby enabling the lessor to gain an unconscionable advantage, are not inquiries now involved. Nor do we see that they can arise in this cause, or unless there should be an effort to enforce the clause or covenant of the lease, which imposes the obligation. There is no possible aspect of the case in which the evidence was not irrelevant, and it was properly excluded.

A lessee of premises destroyed during the term by unavoidable accident is not excused from the performance of an express provision or covenant to pay rent for the term, unless he has protected himself by an express stipulation for the cessation of rent in that event, or the landlord has covenanted to repair or rebuild.—3 Kent, 603; Taylor's Land. & Ten. §§ 372-75, 377; *Chamberlain v. Godfrey*, 50 Ala. 530. A limitation, or rather an exception to the general rule, which seems to obtain, and has been specially applied to leases of apartments in a tenement, or to leases of tenements for particular uses, is, that the destruction must not be of the entire subject-matter of the lease; there must be remaining something capable of holding and enjoyment by the lessee. The value of the premises may be diminished; they may be rendered incapable of yielding the benefit it was expected to realize from their use and occupation. So long as the thing is capable of holding under the lease, the

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obligation and duty of paying the rent continue.—*Chamberlain v. Godfrey*, *supra*; *McMillan v. Solomon*, 42 Ala. 356. Whether this limitation or exception to the general rule, holding a lessee to liability upon his express and unconditional promise or covenant to pay rent, is not, as it has been usually applied, confined to a lease of tenements for particular purposes, or to the apartments of a tenement, and can not be extended to a lease of lands and tenements, is not now of importance. This lease is of lands and tenements, accompanied with the right of quarrying stone upon the lands during the term. The only injury or destruction upon the premises was of the lime-kiln, the use of which, it may be, was the principal consideration moving the lessee to enter into the lease, and it was probably the thing from which it was expected the principal profit would issue. The lands and the tenements remain, capable of use and enjoyment, and the right of quarrying stone continues. It would be a latitudinous construction of the exception, not warranted by authority, that would draw this case within its influence. There is no error in the several rulings of the circuit court upon this point.

The eviction of a tenant consists in the disturbance of his possession, his expulsion or amotion depriving him of the enjoyment of the premises demised, or any portion thereof, by title paramount, or by the entry and act of the landlord. The eviction may operate a bar, partially or wholly, to the right to demand rent falling due in the future.—*Taylor's Land. & Ten.* §§ 378–88. If it be from a part only of the premises, by title paramount, the rent is discharged partially, in proportion to the value of the premises of which the tenant is dispossessed. But if the eviction is the act of the landlord, the entire rent is suspended during its continuance, for the reason that a man can not apportion his own wrong, and the landlord shall not so apportion his tortious act and entry, as to compel the tenant to pay rent for the part of the premises upon which he does not enter.—*Royce v. Guggenheim*, 106 Mass. 201 (8 Am. Rep. 322); *De Witt v. Pierson*, 112 Mass. 8 (17 Am. Rep. 58, note); *Crommelin v. Thiess*, 31 Ala. 412; *Chamberlain v. Godfrey*, 50 Ala. 530. A mere trespass by the landlord upon the premises, not intended by him as a permanent amotion or expulsion of the tenant, or to deprive him of the possession and enjoyment of the premises, may entitle the tenant to recover damages, but it will not amount to an eviction. *Taylor's Land. & Ten.* § 380; *Lounsbery v. Snyder*, 31 N. Y. 514; *Edgerton v. Page*, 20 N. Y. 281; *Lynch v. Baldwin*, 69 Ill. 210. If the damages are capable of legal measurement by a pecuniary standard, as if they consist only of the value of use and occupation during the continuance of the trespass,



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they would form proper matter of set-off to an action by the landlord for the recovery of rent.—*Cage v. Phillips*, 38 Ala. 382; *Holley v. Younge*, 27 Ala. 203; *Kannady v. Lambert*, 37 Ala. 57. Or if the damages are unliquidated, and not capable of legal measurement by a pecuniary standard, they will form matter for recoupment in an action by the landlord for the recovery of rent.—*Lynch v. Baldwin supra*; *Batterman v. Pierce*, 3 Hill, 171. The eviction, or the trespass, may be the act of the landlord in person, or it may be the act of a servant or agent, for which he is answerable upon the general doctrine holding a principal liable for the misfeasances or torts of a servant or agent.—Story on Agency, § 452. Direct or positive evidence that the wrongful act, whether it be of eviction or of trespass, was done under the authority, or by the consent of the landlord, is not necessary. Such evidence is not often attainable, and the fact, like any other controverted fact, is capable of proof by circumstances. The nature and character of the act, taken in connection with the relation of the landlord to the actor; his employment or agency in the business of the landlord; and the acquiescence of the latter in former acts, accompanied by circumstances indicative of his knowledge that the act was done, or continued, and the absence of objection upon his part, are facts which must be considered by the jury, whose business it is to determine the inquiry, whether he authorized or assented to the act complained of as wrongful. *McClung v. Spotswood*, 19 Ala. 165; *Krebs v. O'Grady*, 23 Ala. 726; *Gimon v. Terrell*, 38 Ala. 208. When the landlord enters and dispossesses the tenant of a part of the premises, a discharge of the entire rent will not result, unless it be shown that the tenant surrendered or abandoned possession entirely. Nothing less than an entire abandonment or surrender will operate a dissolution of the tenancy, and a suspension or discharge of the whole rent. The rent is discharged only *pro tanto*, to the extent of the value of the use and occupation of the part of the premises of which the tenant is dispossessed, if he remains in undisturbed possession of the residue.—*Crommelin v. Thiess*, 31 Ala. 412; *Chamberlain v. Godfrey*, 50 Ala. 530; *Willard v. Tillman*, 19 Wend. 358.

The fifth instruction to the jury, given at the request of the plaintiff, in view of the rules we have stated, is misleading in its tendency, if not in all respects erroneous. It must be admitted, as is affirmed in the instruction, that the burden of proving an eviction rested upon the tenant. It is affirmative matter of defense, the *onus* of proving which rests upon the party pleading or relying upon it, in discharge of a legal obligation. When the law casts upon a party the burden of proving a fact, for all the purposes of a particular case, the fact can

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not be supposed to exist, if the evidence of its existence does not satisfy the minds of the jury. This is not the only proposition the instruction embodies and affirms; it proceeds to declare that the jury must be satisfied "that Mrs. Wagner, the plaintiff in this cause, did actually evict Warren from the premises, by taking possession thereof, and denying or refusing Warren the right to use or occupy the said premises under the lease." Instructions given or refused must be taken and construed in connection with the evidence, for it is to the evidence the jury are expected to, and will apply them. The eviction, or trespass, whichever it may be ascertained is its true character, the evidence tends to prove, was not the personal act of Mrs. Warren, but of her husband, and her responsibility for it is to be traced to the fact (if the fact be shown) that she authorized or assented to it. The only intepretation of the instruction, in view of the evidence, is that her personal act only, not the act of another, authorized or assented to by her, will amount to an eviction. An eviction is not necessarily an actual, forcible taking possession of the demised premises, or any part thereof, nor does it necessarily consist in the expulsion of the tenant; nor need it be attended with a denial or refusal to permit the tenant longer to occupy under the lease. *Lounsbery v. Snyder*, 31 N. Y. 514; *Edgerton v. Page*, 20 N. Y. 281; Taylor's Land. & Ten. § 381. The duty and obligation of the tenant to pay rent result from his beneficial enjoyment of the premises, unmolested by the landlord. There is molestation, relieving him from the duty and obligation, whenever the landlord, personally, or through the act of another, however quietly, enters upon, and possesses himself of the premises, or any part thereof. The possession itself, taken and continued, though it may be in the absence, and without the knowledge of the tenant, is inconsistent with his possession and beneficial enjoyment, which the landlord is bound not only to abstain from molesting, but to maintain. There is no duty resting upon the tenant to demand of the landlord restoration, and, of consequence, there can be no necessity for a refusal to restore, as an element of eviction. Yet, such is the irresistible inference from the instruction. If the landlord, by himself, or by the entry of another, which he authorized, or to which he assents, enters upon, and takes possession of a material portion of the premises, the entry and possession, at the election of the tenant, is an eviction from the whole, authorizing an abandonment of the lease, and absolving the tenant from the payment of rent falling due in the future. But if the tenant elects, he may remain in possession of the residue of the premises, and if he makes the election, the tenancy is dissolved only partially, and the discharge of rent

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is only partial. The entry and possession of the landlord, or of another by his authority, or with his assent, though there is no actual, or forcible, or physical expulsion of the tenant, is of itself an eviction. While the tendency of the instruction is misleading, we do not say that, of itself, it should operate a reversal of the judgment; perhaps, the defendant ought to have asked an explanatory charge, obviating the misleading tendency.

The seventh and eighth instructions, requested by the defendant and refused by the circuit court, affirm only the propositions which we have heretofore stated, that the agency of the husband, or the assent of the wife to his act may be proved by circumstances, and that it may be inferred from his employment in the transaction of her business, and her acquiescence in his former acts in reference to the leasing of the premises, their relationship, and the nature and character of the act imputed to him. The inference, or implication is of fact, to be drawn by the jury; it is not an inference or implication of law. It is the province of the jury to determine whether the facts show the agency or authority of the husband, or the assent of the wife to his act. The facts and circumstances are competent evidence for their consideration in determining the existence of either or both facts; whether it be sufficient rests in their judgment. The errors to which we have adverted compel a reversal of the judgment.

Reversed and remanded.

## Blake v. Harlan.

### *Motion to Establish Bill of Exceptions.*

1. *Probate court; term of.*—While a term of the probate court may be kept open from day to day, even after the active business of the term has been disposed of, for the purpose of signing a bill of exceptions, the power of the court to keep the term open can not, in the nature of things, extend beyond the next regular term.

2. *Motion to establish bill of exceptions; when refused.*—Where a bill of exceptions in a contested will case in the probate court, as prepared and presented to the presiding judge in term time, was faulty and inaccurate, not truly stating the point, charge, or decision, wherein the court was supposed to have erred, with such a statement of the facts as was necessary to make it intelligible, and its errors were not corrected until after the expiration of the term of the court at which the trial was had,—held, on motion in this court to establish the bill, there being no consent or agreement of counsel in writing, that it should be signed in vacation,



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that the moveants failed to make a case which authorized this court to establish the bill.

APPEAL from Cleburne Probate Court.

Tried before Hon. THOMAS J. BURTON.

This was a motion in this court by the appellant to establish a bill of exceptions. The facts are stated in the opinion.

STONE, J.—This was a contested will case, tried before a jury in the probate court. The trial was commenced on Thursday, the 6th day of January, 1881, and continued until the next Thursday, the 13th. This necessarily included a regular term of the probate court, which is required to be held on the second Monday in each month. The second Monday was 10th January, 1881. The next regular term of the probate court was the second Monday in February, which, in that year, fell on the 14th day of the month.—Code of 1876, § 701.

We will not deny the right of the probate judge to keep the court open from day to day, even after the active business of the term is disposed of. This might frequently become necessary, and, notably, when a lengthy bill of exceptions is to be prepared. These, to be available, must be prepared and signed in term time, "unless by consent or agreement of counsel in writing," further time is allowed.—Code of 1876, § 3113; *Ex parte Mayfield*, 63 Ala. 203. But the power of the court to keep one term open can not, in the nature of things, extend beyond the next regular term. So, in this case, the January term must needs have closed before February 14th. To hold otherwise, would be to hold that two terms of one and the same court could be in session at one and the same time.

There was no consent or agreement of counsel, in writing, entered into in this case, and the bill of exceptions tendered for signature, allowing the longest possible time the court could have been kept open, did not truly state the point, charge, opinion, or decision, wherein the court was supposed to have erred, with such statement of the facts as was necessary to make it intelligible. So far from this being the case, the bill tendered is shown to have been faulty and inaccurate. Not until several days after February 14th, was it so corrected, that it truly presented the points sought to be reviewed. In this, we are borne out by all the testimony. The moveants have failed to make a case, which will authorize us to establish the bill of exceptions.—*Ex parte Mayfield*, 63 Ala. 203; *Posey v. Beale*, 69 Ala. 32; *Garlington v. Jones*, 37 Ala. 240.

Motion denied.

[Ward, Adm'r, v. Patton.]

**Ward, Adm'r, v. Patton.***Bill in Equity by Judgment Creditor for Redemption of Lands.*

1. *Amendment of bill in equity; office of.*—The office of an amended bill, when it is not employed under the statute for the purpose of introducing supplemental matter, facts occurring after the filing of the original bill, is the curing of defects in the original bill, and not the introduction of new matter, varying substantially the relief prayed, or the right in which it is claimed.

2. *Bill in double aspect; relief in either aspect must be the same.*—While a bill in equity may be framed originally in a double aspect, or in the alternative, or, if not so framed originally, may, by amendment, be converted into a bill of that character, this does not authorize the introduction into the bill as originally filed, or as amended, several inconsistent claims to relief, founded on different states of fact, either of which, if true, would entitle the complainant to relief of a wholly different character; but each alternative must be the foundation for like relief, or for relief of the same character.

3. *When amendment a departure from original bill.*—A bill having been filed by a judgment creditor of F. against P. and others, to redeem lands which had been purchased by P. at sheriff's sale, and afterwards redeemed from him by another judgment creditor of F., it was, by amendments, converted into a bill for the enforcement of a trust concerning the lands, alleged to have arisen from an agreement into which the complainant, P. and the other judgment creditor of F. had entered; and afterwards, by another amendment, all the parties were stricken out except P., and the bill reduced to a demand for the recovery of damages from P., because, by an alienation to a stranger pending the suit, he had incapacitated himself from executing the trust, or performing the agreement. *Held*, that the amendments departed entirely from the case made by the original bill, and that there was no error in the decree of the chancery court sustaining a demurrer thereto.

APPEAL from Madison Chancery Court.

Heard before Hon N. S. GRAHAM.

The facts are sufficiently stated in the opinion.

WATTS & SONS, D. P. LEWIS and CABANISS & WARD, for appellant.

HUMES, GORDON & SHEFFEY, *contra*.

BRICKELL, C. J.—The original bill was filed by the appellant as a judgment creditor of Robert Fearn, to be let in to redeem, under the statute, certain lands the appellee had purchased at sheriff's sale, and which were subsequently redeemed from him by George P. Beirne, as administrator of Charles

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H. Patton, another judgment creditor of Fearn. Subsequent amendments converted the bill into a bill for the enforcement of a trust concerning the lands, supposed to arise from an agreement into which the appellant, the appellee and Beirne had entered. The last amendment, to which a demurrer was sustained, all other parties defendant having been stricken out, reduced the bill to a demand for the recovery of damages from the appellee, because, by an alienation to a stranger pending the suit, he had incapacitated himself from executing the trust, or performing the agreement.

The amendment of a bill is not the institution of a new suit ; it is the mere continuation of the original suit. When it is not, under the statute, employed for the purpose of introducing supplemental matter, facts occurring since the filing of the original bill, the office of an amended bill is curing defects in the original bill, and not the introduction of new matter, varying substantially the relief prayed, or the right in which it is claimed.—*Ray v. Womble*, 56 Ala. 32. A bill may be framed originally in a double aspect, or in the alternative, as it is sometimes expressed ; or, if not so framed originally, may, by amendment, be converted into a bill of that character. But by this it is not intended that a complainant may introduce into a bill originally, or by amendment, several inconsistent claims to relief, founded on differing states of fact, either of which, if true, entitled him to relief of a wholly different character. Each alternative must be the foundation for like relief, or for relief of the same character.—*Lehman v. Meyer*, 67 Ala. 396. It is obvious the original bill would have been fatally defective, if into it had been introduced, as alternative grounds for relief, the matters stated in the several amended bills ; or if these matters had been stated, and the relief prayed in reference to them had been prayed in the original bill.

The amendments, it is also apparent, departed entirely from the case made by the original bill, introduced an essentially new case, entitling the plaintiff to relief in a different right, upon a different title, and of a different character, from that claimed, or to which he was entitled under the original bill. There was no error in sustaining the demurrer, and the decree is affirmed.



[Smith v. Aikin et al., Ex'rs.]

**Smith v. Aikin et al., Ex'rs.**• *Assumpsit.*

1. *Latent ambiguity in written contract; admissibility of parol proof in explanation of.*—By written contract, S. agreed to saw lumber for H. “at the price of two dollars per thousand feet,” without indicating the rule or mode by which the lumber should be measured. At the time the contract was made, there existed two rules or modes of measurement, well known and understood by those engaged in the business of sawing lumber, and differing in results; one being to measure the logs before sawing them, and then, by calculation, to ascertain what quantity of lumber they would produce when sawed into inch boards; and the other, to estimate the lumber by actual measurement after sawing. *Held*, that the words, “at the price of two dollars per thousand feet,” created a latent ambiguity in the contract, and that, in an action on the contract, parol evidence was admissible to show the rule or mode of measurement, in reference to which the parties contracted.

APPEAL from Etowah Circuit Court.

Tried before Hon. LeROY F. BÖX.

The facts are sufficiently stated in the opinion.

DENSON & DISQUE, for appellant. The court erred in allowing the parol evidence introduced against appellant's objection. *Sweeney v. Thomason*, 9 Lea. 359; *Willmering v. McGaughey*, 30 Iowa, 205; *Thorpe v. Sugh*, 33 Ala. 330; *Ins. Co. v. Wright*, 1 Wall. 456; *Stagg v. Ins. Co.*, 10 Wall. 589; *Bailey v. Railroad*, 17 Wall. 96; *Partridge v. Ins. Co.*, 15 Wall. 573; *Moran v. Prather*, 23 Wall. 493; *Davis v. Bull*, 6 Cush. 505. The words used in the contract are plain and unambiguous, and of well defined legal and popular meaning, and, therefore, they must be the sole expositor of the meaning and intention of the parties; and parol testimony is inadmissible to show the intent or meaning of the parties by the use of such words. *Willmering v. McGaughey*, *supra*.

J. B. MARTIN and DORTCH & DUNLAP, *contra*. The contract, when considered in connection with the evidence, presents a clear case of latent ambiguity. Extrinsic evidence is, therefore, admissible to show to which one of the two modes of measuring the lumber the parties intended to adopt.—*Doe, ex dem. Hughes v. Wilkinson*, 35 Ala. 462; *Gunn v. Clendenin*, 68 Ala. 294; *Chambers v. Ringstaff*, 69 Ala. 140; *Keller v. Webb*, 125 Mass. 88 (28 Am. Rep. 209); *Gray v. Harper*, 1

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Story, 574; *Hart v. Hammett*, 18 Vt. (3 Wash.) 127; *Barrett v. Stow*, 15 Ill. 423; *Douley v. Tindall*, 5 Am. Rep. 240; *Stoops v. Smith*, 100 Mass. 63 (1 Am. Rep. 85).

STONE, J.—Hollingsworth agreed with Smith that the latter should saw lumber for him during the year 1878, “at the price of two dollars per thousand feet, to include thirty feet logs.” Hollingsworth was to furnish the logs, and stack the lumber after it was sawed. Hollingsworth has died, and the present suit is against his executors, to recover an alleged balance due on said contract. The contract was in writing, and we have copied above all it expresses in relation to the terms on which the sawing was to be done. Various accountings and settlements were had between the parties, growing out of said contract, during the time the work was being done, and shortly afterwards. All these were during the life of Hollingsworth.

For defendants, appellees in this court, it was contended there were two rules or modes of measurement, well known and understood by mill-men. One mode was to measure the logs before sawing them, and then, by calculation, ascertain what quantity of lumber they would produce, when sawed into inch boards. Sawing into boards necessarily implies the running of many seams through the log, and the cutting away in chips or saw-dust much of the substance of the log. Skilled mill-men estimated the waste at about one-fifth, when the timber is cut into inch boards. Measurement by this rule is called log-measure, because it is the method of ascertaining the capacity of the log, before it passes through the mill. According to this measurement, each inch board cut from the log would reduce it about  $1\frac{1}{4}$  inches, the extra quarter inch being wasted in the sawdust. The other method was to estimate the lumber by actual measurement after sawing. It will be readily understood that, by this mode of measurement, the larger the pieces into which the lumber is sawed, the less the waste in sawing, and consequently the more the lumber produced from the log. And so, by this measurement, the less the labor bestowed, the greater the yield.

The real issue in this cause is, by what rule of measurement—whether by log or line measure—the account was to be stated. If by log-measure, then nothing was due plaintiff. If by actual measurement of the lumber after it was sawed, then there was something due him; for most of the lumber sawed was in large pieces. The testimony given tended strongly to show the account was agreed to be stated on the rule of log-measurement, and so the jury found.

It is contended for appellant that this contract is plain in itself, is worded in plain language which has a plain, unam-

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biguous meaning in popular acceptation, and that it was the duty of the court to interpret it; and hence, it is claimed that the well settled principle of law, not to receive oral testimony to add to, vary, or contradict a written contract, applies to, and governs this case. And the plaintiff objected in the court below to all testimony that there were two scales for the measurement of lumber, and that the contract in this case was, that the measurement should be by the log-scale. It is replied to this that this was a contract between persons not dealing in the matter of buying and selling lumber, but engaged in the business of sawing logs into lumber, and having then so sawed; and that in that business, the rule of measurement by what is called the log-scale is well understood; that considering the undisputed fact that Hollingsworth was to furnish, and did furnish the logs, out of which the lumber was to be sawed, and was to be owner of the lumber when sawed, this was not a contract of sale, but a mere hiring of labor; and that the substance of the contract was, that Hollingsworth hired Smith to saw his logs into lumber. Hence, it is contended that the words "per thousand feet," found in the written contract, are shown by the facts and circumstances in this case to be ambiguous—a latent ambiguity, not appearing on the face of the instrument,—and such ambiguity, so made to appear, may be explained by oral proof.—1 Greenl. on Ev. § 278; *Gunn v. Clendenin*, 68 Ala. 294; *Chambers v. Ringstaff*, 68 Ala. 140.

In the case of *Drake v. Goree*, 22 Ala. 409, Justice Goldthwaite employed the following clear and forcible language: "The contract may relate to the time required for the making of an article, the process of which is known only to those actually engaged in its manufacture; to a thousand matters of art or skill, where truth is only to be attained through the medium of experts; and in cases of this character, is the court blindly to grope its way to conclusions, for no other reason than because the construction of a written instrument is involved, or to obtain through testimony that information upon which alone it can decide understandingly? Upon principle, as well as authority, we entertain no doubt that in all cases where a written contract, although complete in itself, contains a term which it is impossible for the court to construe, without the aid of evidence *aliunde*, it is proper to resort to such evidence for that purpose."

The case of the *Attorney General v. Shore*, frequently referred to as "Lady Hewley's Charities," 11 Sim. 592, republished, 34 Eng. Ch. Rep. 592, was first considered before Vice Chancellor Shadwell, afterwards before the Lord Chancellor, and last, the House of Lords. The latter tribunal took the opinion of the judges. The instruments to be construed con-



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tained the language, "Godly preachers of Christ's Holy Gospel," and "Godly widows" of such preachers, as beneficiaries to take under them. The question was, who were "Godly preachers of Christ's Holy Gospel," as intended to be understood by the grantor. How was her intention to be ascertained? Baron Parke said: "There is no doubt that not only where the language of the instrument is such as the court does not understand, is it competent to receive evidence of the proper meaning of that language, as, when it is written in a foreign tongue, but it is also competent where technical words or peculiar terms, or, indeed, any expressions are used, which, at the time the instrument was written, had acquired any appropriate meaning, either generally, or by local usage, or amongst particular classes. This description of evidence is admissible in order to enable the court to understand the meaning of the words contained in the instrument itself." Lord Ch. J. Tindal said: "The general rule I take to be that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. . . . The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments, . . . in cases where terms of art or science occur; in mercantile contracts, which, in many instances, use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general, common meaning, have acquired, by custom or otherwise, a well known, peculiar, idiomatic meaning in the particular country in which

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the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life."

The language of the contract we are considering is very brief, if not inaccurate and incomplete. "Smith agrees to saw lumber for Hollingsworth." Mills do not saw lumber. They saw logs into lumber. Mills do not grind meal. They grind grain into meal. Carpenters saw lumber; that is, they saw it into different shapes and sizes. Supplying, in this contract, the words which were necessarily understood, we have Smith's agreement with Hollingsworth to saw his, Hollingsworth's, logs into lumber for Hollingsworth, "at the price of two dollars per thousand feet." Is it two dollars per thousand feet of sawed lumber, or two dollars per thousand feet of logs sawed into lumber? According to the testimony, the language of this contract has two plain, well understood meanings, in the dialect of mill and lumber men, which brings it within the reason of the rule as to latent ambiguity. It falls also within Lord Ch. J. Tindal's rule, in which "words, besides their general, common meaning, have acquired, by custom, or otherwise, a well known, peculiar, idiomatic meaning," in the locality in which the parties reside, or in the trade or business in which they are engaged.

There is no error in the record.

Affirmed.

## McCorkle v. Rhea.

### *Ejectment.*

1. *Petition for sale of lands for division among joint owners; jurisdictional averment.*—An application to the probate court under the statute, for the sale of lands owned by tenants in common, for division among the owners, "must set forth the names of all the persons interested in the property" sought to be sold. This is a jurisdictional averment; and an order of sale granted on an application which, on its face, shows that it has failed to set forth the names of all the persons interested in the property, is void, and a purchaser at a sale made thereunder acquires no title.

2. *Same.*—Hence, an order for the sale of lands, in such case, granted on the application of the administrator of a deceased tenant in common, which avers that his intestate owned, in his life-time, a designated undivided interest in the lands, but does not set forth the names of the persons who owned such interest at the time of the application, or to whom it descended on the death of the intestate, is void; and the title of the heirs is not divested by a sale made under such order.

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APPEAL from Etowah Circuit Court.

Tried before H. C. SEMPLE, Esquire, acting as Special Judge.  
The facts are sufficiently stated in the opinion.

S. F. RICE and J. W. INZER, for appellants.

DENSON & DISQUE, *contra*.

SOMERVILLE, J.—It is admitted that the plaintiffs can recover in the present action, which is one of ejectment, unless the title of the lands sued for was divested out of them by certain proceedings in the probate court of St. Clair county, which transpired in the year 1859, on the application of the administrator of James Hampton, deceased, under whom the plaintiffs claim title as children and next of kin.

The application was made for the sale of these lands for distribution among the joint owners or tenants in common, upon the alleged ground that they could not be equitably partitioned or divided among them without a sale. It was made, as authorized by the statute, by the personal representative of a deceased person in interest, who during life was one of the joint owners.

It is insisted that the application was fatally defective in failing to set forth the names of all the persons who were interested in the property, and that this being a jurisdictional allegation, required by statute, and the defect appearing upon the face of the record, the probate court was without jurisdiction to order the sale, and the purchaser for this reason acquired no title, and none was divested out of the plaintiffs.

It is our opinion that this position is well taken, and that the plaintiffs were, therefore, entitled to a recovery. The application was made under the provisions of the act approved February 5, 1856, amendatory of section 2677 of the Code of 1852. Pamph. Acts, 1855-56, pp. 20-22. This statute, together with the act of February 8, 1858, relating to the same general subject-matter (Pamph. Acts 1857-58, p. 252), is found embraced in the Code of 1867, sections 3105 to 3126 inclusive. The history of this legislation shows that proceedings for the *partition* of property owned by tenants in common, and those for *distribution by sale* among the same class, constitute but one entire system, which is *in pari materia*, and must necessarily be construed together as parts of one whole.—*Turnipseed v. Fitzpatrick*, at present term. It is manifest that the statute requires that each class of applications—those praying the sale of property for distribution, as well as those praying for partition—“must set forth the names of *all the persons interested* in the property [prayed to be sold] and their resi-



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dence," with a full and accurate description of the property, if it be land, with the interest of each person in the same." Code, 1852, § 2678; Pamph. Acts, 1855-56, p. 20; Pamph. Acts, 1858, p. 252; Rev. Code, 1867, §§ 3105-6; *Id.* §§ 3120-21; Code, 1876, §§ 3497-98; *Id.* §§ 3514-15; Freeman on Void Jud. Sales, p. 33.

The application in the present case, which is under our review collaterally, is fatally defective in the foregoing particular. We only know its contents by the recitals contained in the judgment of the probate court, which we may deem sufficient without the production of the written application, as the court is shown to have received, and acted upon it.—*Bland v. Bowie*, 53 Ala. 159; *Pettus v. McClannahan*, 52 Ala. 55. It avers that James Hampton, the decedent, owned during his life-time two undivided fifths of the land, and that three other persons named owned the other undivided three-fifths, in equal proportions. It is not averred who owned the interest of Hampton, or to whom it descended after his decease. It was impossible that the title to his interest could remain in abeyance. It must have been owned by, or have vested in some one. Under the statute the real estate of persons dying intestate descends, subject to the payment of debts, and other charges, to the heirs or next of kin of the decedent in an order prescribed.—Code, 1876, § 2252. The application should have shown who these heirs or next of kin were, in order that they might have been brought before the court, and have had an opportunity to defend their interests.—Freeman on Void Jud. Sales, p. 33. This was a jurisdictional allegation, and its omission was fatal to the jurisdiction of the court ordering the sale. In the absence of such jurisdiction, the purchaser acquired no title to the lands in controversy.

The question here involved was determined in accordance with the foregoing view in *Whitman v. Reese*, 59 Ala. 532, where it was held necessary to the jurisdiction of the probate court, in proceedings of this nature, that the petition should aver the names of all persons who are interested in the property, and that, in the absence of such jurisdictional allegation, the proceedings were entirely void. This ruling was reaffirmed in *Johnson v. Ray*, 67 Ala. 603.

Perhaps these cases are not in strict analogy to the line of decisions, so long prevailing in this State, in which it is held, that, upon application by an administrator to sell the lands of a decedent, the failure of the petition to state the names of the heirs, although expressly required to be done by the statute, is not the omission of a jurisdictional averment, which would render the sale void, but a mere irregularity rendering the judgment reversible on error.—*Duval v. McCloskey*, 1 Ala.

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708; *Matheson v. Hearin*, 29 Ala. 210. This principle has become a rule of property in this State in this particular class of cases, and under its influence many titles have, no doubt, been acquired. However unsound we might be disposed to regard it, we do not feel at liberty to depart from it at this time.

We are not disposed to extend it, however, to proceedings instituted under sections 3497 and 3514 of the Code, where an application is made for the partition of property among joint owners, or for an order of sale of such property made with the view of distributing the proceeds of sale among those entitled. The two classes of cases are now too well recognized by our decisions to be disturbed or overturned.

We need notice no other points raised by the record.

The judgment of the circuit court is reversed, and the cause remanded.

## Downing v. Blair.

### *Statutory Real Action in the Nature of Ejectment.*

1. *Ejectment; legal title prevails over superior equities.*—Where a purchaser of land, giving his note for unpaid purchase-money, receives a conveyance, takes possession, and then executes a mortgage on the land, the mortgagee can maintain ejectment against a purchaser at a sale made under a decree of a court of equity, rendered on a bill filed to enforce a vendor's lien, by a transferee of the note given for the purchase-money against the purchaser, to which the mortgagee was not made a party. In such case, the legal title, which was in the mortgagee, not being before the court, was not divested; and it must prevail at law over the defendant's superior equity.

2. *Acknowledgment of conveyance of land; its effect, when in form prescribed by the statute.*—When a mortgage or other conveyance of land is duly acknowledged before a proper officer, and the requisite certificate of acknowledgment is affixed in the form prescribed by the statute, this constitutes such cogent proof of free agency and absence of restraint, as to be perfectly conclusive, unless rebutted by clear proof of fraud or imposition practiced on the grantor, in which the officer or grantee participated.

3. *Mortgage; legal title after default in mortgagee.*—After the law-day of a mortgage, and default in the payment of the secured debt, the legal title to the mortgaged premises vests in the mortgagee, and he may convey it to another, although he is not in possession, and does not assign the secured debt.

4. *Same; when mortgagee a purchaser for value.*—When a mortgage, securing a pre-existing debt, is executed in consideration of an extension of the debt, this constitutes the mortgagee a purchaser for value.

APPEAL from Etowah Circuit Court.

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Tried before R. A. D. DUNLAP, Esquire, Special Judge.

This was a statutory real action in the nature of ejectment, by P. E. Blair, suing by her next friend, Levi C. Blair, against Archibold Downing; and was commenced on 23d November, 1880. The defendant pleaded not guilty, and also a special plea, averring, in substance, that in January, 1873, he purchased the lands sued for from Levi C. Blair, the plaintiff's husband, executing his promissory note for part of the purchase-money, receiving a deed to the lands, executed by the said Blair and wife, and taking immediate possession; that the note not having been paid, one W. P. Neeley, to whom the said Blair had transferred said note, filed a bill in equity against defendant to enforce a vendor's lien for the unpaid purchase-money; and, on 23d June, 1877, he obtained a decree declaring a lien on the lands in his, Neeley's, favor, and ordering them sold for the payment of said note; that on 4th February, 1878, the lands were sold under said decree, and, at the sale, the said Neeley became the purchaser, receiving the register's deed to, and taking possession of the lands; that afterwards the said Neeley died "leaving a last will and divers children, heirs at law and legatees under his said will;" that afterwards, in January, 1880, "the children, heirs at law and legatees under the will of said W. P. Neeley sold and conveyed the said lands" to defendant's wife; and that since that time the defendant has been in the possession of said lands, as husband and trustee of his wife, she holding the same as her statutory separate estate. To this plea the plaintiff demurred, assigning the following, among other grounds of demurrer: (1) It does not allege that the plaintiff was a party to the bill in equity filed by said Neeley; or that the plaintiff was, in any way, bound by the decree rendered in that cause; (2) it does not show that the legal title to the land sued for was not in the plaintiff at the commencement of this suit; and (3) "all defenses set up can be made under the general issue." The court sustained the demurrer, and thereupon the cause was tried on issue joined on the plea of not guilty, the trial resulting in a verdict and judgment for the plaintiff.

On the trial, the plaintiff read in evidence a mortgage executed by the defendant and his wife on 1st December, 1875, in the presence of subscribing witnesses, conveying the lands sued for to one Thomas W. Francis, to secure a debt then past due, and which was extended until 1st February, 1876, in consideration of the security afforded by the mortgage. Two certificates of acknowledgment, shown to have been signed by one Shores, a justice of the peace, are appended to the mortgage; one, an acknowledgment by the defendant, and the other an acknowledgment by his wife, the latter in the form prescribed by



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the statute for the execution by married women of conveyances of their husbands' homesteads. The plaintiff also read in evidence a conveyance executed by said Francis, conveying to the plaintiff all the right, title and interest which he had in the lands sued for, under and by virtue of said mortgage. The defendant, after introducing evidence tending to show that, at the time of the execution of said mortgage, he resided, and, from that time to the time of the trial, he had continued to reside, with his wife and family, on said lands "as his homestead," examined as a witness said Shores, and asked him whether he read over to Mrs. Downing, before signing it, the certificate of her acknowledgment of said mortgage. To this question the plaintiff objected, and her objection was sustained, and the defendant excepted. The defendant also asked said witness whether said certificate was true or false, stating, in connection with this question, "that he did not charge any specific or actual fraud on the part of the justice, but that he, by mistake, not knowing that it was necessary, did not in fact examine the wife separate and apart from the husband, but that all that took place was in his presence." The plaintiff having objected to the question, the court sustained the objection, and the defendant excepted. The defendant also asked said witness whether "he examined Mrs. Downing separate and apart from her husband." To this question an objection made by the plaintiff was sustained by the court, and the defendant excepted. Other evidence, of like character, offered by the defendant for the purpose of assailing the truth of the facts stated in said certificate of acknowledgment, was excluded on the plaintiff's objection, and exceptions were reserved by the defendant. The defendant also read in evidence a transcript of the record in the suit brought by Neeley against him, referred to in his special plea, and the deed executed by the register to Neeley, also mentioned in said plea.

The foregoing being the substance of the material portions of the evidence introduced on the trial, the court charged the jury, at the plaintiff's written request, that if they believed the evidence, they must find for her; and to this charge the defendant excepted.

The rulings above noted are among the errors here assigned.

WATTS & SONS, for appellant.

AIKEN & MARTIN, *contra*.

SOMERVILLE, J.—The title of the plaintiff, Mrs. Blair, to the lands sued for would seem very clearly to be *prima facie* good, unless vitiated by some one of the several defenses set

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up, which we will proceed to consider. Her chain of title is as follows: (1) A deed from Levi C. Blair to the defendant, Downing, executed in 1873; (2) a mortgage by Downing and wife to one Francis, in 1875; (3) a conveyance by Francis of his legal title, as mortgagee, to the plaintiff, in 1880.

It is claimed, in the first place, that a superior title was acquired by Neely at the register's sale, in February, 1878, and was transferred by him to the defendant. When Blair sold to Downing, in 1873, conveying to him the legal title, the latter executed his promissory note for an unpaid balance of three hundred dollars, purchase-money due on the land. This was, without question, a lien on the land, superior to all other equities. The enforcement of it, however, by Neely, who became the transferee of it from Blair, did not affect the legal title then vested in Francis, for the plain reason, that Francis was not made a party to the bill for foreclosure of the lien. The legal title was not before the court, and could not be divested. Judgments and decrees of courts affect only the rights of parties and privies, and not of strangers. When the chancery suit was commenced, Francis was the holder of the legal title by conveyance from Downing. The superior *equity* merely can not be tested in an action of ejectment, which concerns only rights strictly legal.

The evidence offered by the defendant, seeking to assail the truth of the facts stated in the certificate of acknowledgment, appended by the justice of the peace to the mortgage of Francis, executed by Downing and wife on December 1st, 1875, was properly excluded. The rule is settled by our decisions, and generally by the weight of authority, that where a mortgage, or other conveyance, is duly acknowledged before a proper officer, and the requisite certificate of acknowledgment is affixed in the form prescribed by statute, this circumstance constitutes such cogent proof of a free agency and absence of restraint, as to be perfectly conclusive, unless rebutted by clear proof of fraud or imposition practiced on the grantor, in which the officer or the mortgagee participated.—*Miller v. Marx*, 55 Ala. 322; *Moog v. Strang*, 69 Ala. 98; *Johnston v. Wallace*, 24 Am. Rep. 699. There was no effort to assail the instrument on the ground of fraud, or imposition, but only to contradict the truth of the facts recited in the certificate of the justice on the theory of mere negligence or mistake, which was not permissible.

The law is, furthermore, settled in this State, that, after the law-day of a mortgage, and after default in payment of the mortgage debt, the estate at law—the *legal title* of the mortgaged property—vests in the mortgagee, and this title he can convey to another by apt words in a deed of conveyance,

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although the mortgage debt itself is not assigned.—*Welsh v. Phillips*, 54 Ala. 309. There are some authorities which make a distinction between conveyances made by mortgagees *in possession*, and out of possession; but this distinction finds no room for recognition under the theory of mortgages now so fully settled in this State. There would seem to be no great difficulty in holding that a legal title, which, on the death of the holder, descends to his heirs, may be conveyed by contract during the life of the party in whom it is vested.

Francis was undoubtedly a purchaser for valuable consideration. Although the mortgage debt was a pre-existing one, the security was given upon the consideration of its extension, and this was sufficient to constitute the mortgagee a purchaser for value.—*Mobile Life Ins. Co. v. Randall*, 71 Ala. 220; *Thames v. Rembert*, 63 Ala. 561. The case of *Pepper v. George*, 51 Ala. 190, holding the contrary view, has been impliedly overruled by the above authorities, and we now declare it expressly overruled on this point.

We discover no error in the record, and the judgment is affirmed.

### Gilmer v. Wallace.

*Bill in Equity to have Mortgage declared Satisfied, and to Enjoin Sale of the Mortgaged Premises.*

1. *Variance between allegations and proof; when fatal to relief.*—If redundant allegations are introduced into pleadings, and they are descriptive of that which is material, a variance between the allegations and proof is fatal, of the same consequence as a variance between the allegation of an essential fact, and the proof of that fact.

2. *Same.*—Hence, where, in a bill in equity filed by a mortgagor to have the mortgage declared satisfied, and to enjoin a sale of the mortgaged premises, on the ground that the debt secured by the mortgage had been fully paid, a general averment of the fact of payment is followed by particular averments, stating the time, mode and source of payment, and describing the particular transaction from which it was derived, a variance between such particular averments and the proof is fatal to the relief sought, although the evidence may show that the debt has been paid, but in a mode, and from a source different from those averred in the bill.

3. *When decree in vacation, dismissing bill for variance, erroneous.*—It is error for the chancery court to dismiss a bill in vacation, on account of a variance between the allegations and proof, without affording the complainant an opportunity to amend, if there is "any state of evidence which will authorize relief;" and in determining whether there is such a "state of evidence," it is not necessary or proper to pass upon the weight of the evidence, or to enter upon an examination of the evidence



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introduced on behalf of the defendant; but it is sufficient that the evidence for the plaintiff makes out a *prima facie* case, entitling him to relief, the effect of which the defendant must overcome.

APPEAL from Lawrence Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this cause was filed by William Gilmer against W. K. Wallace and H. C. Speake, for the purpose of having decreed satisfied a deed of trust executed by the complainant, on 8th April, 1872, and conveying to H. C. Speake, as trustee, certain lands, to secure a debt which the complainant owed to the defendant Wallace; and to enjoin the trustee from selling the lands under the provisions of the deed. The ground for relief is payment of the secured debt, the bill averring, first, in general terms, the payment of the debt, and then the mode of payment, which is substantially as follows: On 22nd December, 1874, the complainant and one Prewitt exchanged lands, the complainant executing a deed to Prewitt, and Prewitt, in pursuance of an agreement between the complainant and the defendant Wallace, executing a deed to Wallace, the latter having agreed to take the Prewitt lands from complainant at the price of \$2560. It is averred that from this source, the debt secured by the deed of trust, and also a debt which the complainant owed to one Gibson, and which was also secured by mortgage on the same property, were paid, leaving a balance which Wallace paid to the complainant. Wallace answered the bill, denying that the debt secured by the deed of trust had been fully paid; averring that the money he agreed to pay for the Prewitt lands was, by the consent, and at the request of the complainant, applied to other purposes than those stated in the bill, not necessary to be herestated; and insisting that there was still due him on said debt a considerable balance, the amount of which is stated.

The cause was heard on pleadings and proof; and, on consideration thereof, the chancellor, being of the opinion that there was a variance between the allegations of the bill and the proof, caused a decree to be entered, in vacation, dissolving a temporary injunction which had been issued, and dismissing the bill without prejudice; and that decree is here made the basis of the assignments of error.

D. P. LEWIS and W. P. CHITWOOD, for appellants.

T. M. PETERS and W. & L. B. COOPER, *contra*.

BRICKELL, C. J.—The rule prevailing in courts of equity is, that pleading and proof must correspond. “It is not only necessary that the substance of the case made by each party

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should be proved, but it must be substantially the same case as that which he has stated upon the record; for the court will not allow a party to be taken by surprise by the other side proving a case different from that set up in the pleadings."—1 Dan. Ch. Pr. 860; *Floyd v. Ritter*, 56 Ala. 356; *Alexander v. Taylor*, *Ib.* 60. The averment of the bill is in general terms that the debt secured by the deed of trust has been fully paid. This is followed by an averment more precise, stating the time, mode and source of payment, and describing the particular transaction from which it was derived. The latter averment may have been unnecessary and redundant. A general statement or averment of the payment of the debt would have been sufficient, without descending to a statement of the particular facts or circumstances proving, or conducing to prove it. A redundancy of allegation is often of serious consequences, while a redundancy of proof is always harmless. If redundant allegations are introduced into pleading, and they are descriptive of that which is material, a variance between the allegations and proof is fatal, of the same consequence as a variance between the allegation of an essential fact, of that which is material, and the evidence or proof of the fact.—1 Greenl. Ev. § 67. The same measure of relief may be obtainable upon the facts proved, as could have been obtained if the particular facts averred had been proved, but the court can not permit the opposite party to be misled and taken by surprise by the proof of a case differing from that set up in the pleadings, and which, it is presumed, is the case he came prepared to meet, as it is the case he had notice to resist.—*Floyd v. Ritter*, 56 Ala. 356; *Meadors v. Askew*, *Ib.* 584; *Bellows v. Stone*, 14 N. H. 175. Whatever may be the evidence of the payment of the debt, there is no evidence of its payment in the manner, at the time, and from the sources stated in the bill. On the contrary, while the transaction stated is not controverted, and is fully proved, the evidence, without conflict, is, that the moneys derived from it were not applied in payment of the debt, but, with the consent and by agreement of all parties, were otherwise applied in extinguishment of another incumbrance upon the lands. We concur in the opinion of the chancellor, that the variance between the allegations of the bill, and the evidence as to the fact or matter of payment, is fatal to the right of the complainant to relief.

Under the usual practice in courts of chancery, as it was recognized prior to the present statutes, the chancellor could very properly have stopped here and dismissed the bill; all that the plaintiff could have asked properly, not having moved to amend before the hearing, would have been a dismissal without prejudice to his rights to commence another suit, and that

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is awarded to him by the present decree. But the statutes have wrought most material changes in the practice, intended, whether such is their practical effect and operation or not, to expedite the trial of causes upon their real merits, and to avoid all injury resulting from misleading in whatever cause it may originate. At any time before final decree, it is the duty of the court, it is not matter of discretion, but of duty, to allow amendments to bills by striking out or adding new parties, "or to meet any state of evidence which will authorize relief;" and the only terms which can be imposed are the payment of costs. Code of 1876, § 3790. The rule of practice was formerly that an amendment of pleading was matter of solicitation by the parties; it was not the duty of the court to stay the proceedings and direct or request parties to make such as were necessary to meet the necessities of the case. When, as in the present case, the decree is rendered in vacation, after a submission in term time, following the spirit of the statutes, observing their purposes, we have held that the court is not at liberty to pronounce a decree in vacation, disposing of the case because of insufficiency or deficiency in the pleading capable of being cured by amendment, without affording to the party the opportunity of curing it, though he has not offered an amendment or solicited the privilege of offering it.—*Kingsbury v. Flowers*, 65 Ala. 479. The like rule must be applied when, in vacation, the chancellor is constrained to deny relief to the complainant because of a variance between the pleadings and evidence, or because the case made by the proof is inconsistent with the averments of the bill. The most manifest purpose of the statute is the allowance of amendments at the hearing, at any time before the rendition of final decree, "to meet any state of evidence which will authorize relief." An evil consequence supposed to result under the former practice was, that a complainant, having and proving a just demand, was often denied relief, because there was a variance or inconsistency between the allegations of the bill and the evidence, discovered too late to be cured by amendment. Now, if it be discovered at any time before final decree, the objection can be removed by amendment, and the right to remove it by amendment the statute is intended to secure.

There must, however, be shown a "state of evidence which will authorize relief," for, if no such evidence is shown, the variance or inconsistency is immaterial; the bill fails, not because of the variance or inconsistency, but because there is a want of evidence entitling the complainant to relief in any event. Reaching the conclusion that the chancellor should not have dismissed the bill in vacation, because of the variance or inconsistency between the allegations of the bill and the evidence,



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which could be cured by amendment, without affording the complainant the opportunity to amend, the next inquiry is, whether there is a state of evidence which justifies an amendment. In the consideration of this question, it is not necessary, nor is it proper, to pass upon the weight of the evidence; it is enough that the evidence for the plaintiff makes out a *prima facie* case, entitling him to relief, the effect of which the defendant must overcome. This follows because of the right the statute secures to each party to take additional testimony, if the amendment is made in vacation, or, if made in term time, and the opposite party claims, as he may, a continuance as matter of right. If, upon granting leave to amend, the court passed upon the sufficiency of the evidence, the case would be partially decided, without the consideration of the additional evidence the parties have the right to introduce, and decided in the absence of appropriate pleading. When a *prima facie* case is shown, a case which, if not counterbalanced and overcome by opposing evidence introduced by the defendant, would entitle the complainant to relief, he should have the opportunity of adapting his pleadings to meet it. Then the court is in a situation, and the parties are in a condition, to demand that the evidence shall be weighed, and the controversy finally determined.

The evidence in the record introduced by the plaintiff proves *prima facie* the payment of the mortgage debt; but its presentation at once raises the objection, that it does not correspond to the allegations of the bill; an objection fatal to the right to relief, until by amendment it is removed, rendering unnecessary an examination of the evidence introduced by the defendant. There can not be an examination of that evidence, a comparison of it with the evidence of the plaintiff, a determination of the sufficiency of all the evidence to generate a just, rational belief of the existence of the affirmative fact, the burden of proving which rests upon the plaintiff, unless the court determined a hypothetical case, treated the bill as amended, forecasting the case made by the evidence; and such a determination would embarrass, if it is not a practical denial of, the right of the parties to introduce additional testimony, when the amendment is made.

We are of opinion the chancellor erred in the dismissal of the bill without affording the plaintiff the opportunity to amend, curing the variance between its allegations and the *prima facie* case made by the evidence entitling the plaintiff to relief. We do not express any opinion upon the weight of the evidence; nor whether, when it is considered in its entirety, the *prima facie* case made by the evidence for the plaintiff is not overcome and repelled. That is not now a question, in the

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present condition of the pleadings, which can or ought to be considered and determined.

Reversed and remanded.

## Vandiveer v. Stickney.

### *Statutory Real Action in the Nature of Ejectment.*

1. *Possession of land under parol gift; when adverse.*—Possession of land by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, which, if continued without interruption for ten years, is protected by the statute of limitations, and matures into a good title.

2. *Same.*—That such a parol gift conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar is complete, is immaterial; it is evidence of the beginning of an adverse possession by the donee, which can only be repelled by showing a subsequent recognition of the donor's superior title.

3. *Same; when conveyance rendered void by adverse holding.*—A mortgage of the land by the donor to a stranger, during such adverse possession by the donee, is void, although the donee may know that his title is defective, and the mortgagee has no actual notice of the adverse holding.

4. *Adverse possession of land under parol gift; effect of subsequent possession by donor as donee's tenant.*—The fact that the mortgagor was, in such case, in the temporary occupancy of a portion of the land, at the time of the execution of the mortgage, is immaterial, if he entered after the commencement of the donee's adverse possession, and holds as a mere tenant of the latter, fully recognizing his title as landlord and owner; the settled doctrine in this State being, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter.

### APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES E. COBB.

This was a statutory real action in the nature of ejectment, brought by William P. Vandiveer against Henry G. Stickney and Mary E. Stickney; was commenced on 17th May, 1880; and, as to that portion of the land actually in controversy,—to which a disclaimer filed by the defendants did not apply,—the cause was tried on issues joined on the pleas of not guilty and the statute of limitations of ten years, the trial resulting in a verdict and judgment for the defendants.

The evidence introduced on behalf of the plaintiff tended to show that "the property sued for was the property of R. B. Owens at his death; that the said Owens died intestate, in the year 1862, leaving as his only heirs at law his children, William, Edwin, and Emma Owens, and Mrs. Stickney, the defendant; that

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said Emma died in March, 1869, unmarried, and without children;" that on 16th June, 1870, said Edwin and William Owens executed to the plaintiff a mortgage on an undivided two-thirds interest in the land described in the complaint, to secure money then loaned to them by the plaintiff; and that said debt had not been fully paid.

The evidence introduced on behalf of Mrs. Stickney tended to show that her sister Emma, at the time of her death, was about sixteen years of age; that prior to her death she expressed a desire that Mrs. Stickney should have her interest in her father's estate, on account of her care for her, and on account of the money she had spent for her; that within a few days after the death of the said Emma, Edwin and William Owens and Mrs. Stickney "met and discussed the matter between them, and it was agreed between them that Mrs. Stickney should have said Emma's interest in said property;" that this agreement was verbal; that from the time of said agreement, Mrs. Stickney entered into the possession of said property "by herself, or her husband, as trustee, or tenants, claiming the entire property as her own in good faith, continuously, openly, notoriously and adversely;" that she has continued "in such possession of the same by herself, husband or tenants, and was in such adverse possession at the time of the execution of said mortgage to the plaintiff, she, at that time, and ever afterwards, claiming the said property as her own, in good faith, openly, notoriously and adversely to her brothers and all the world;" that on 21st February, 1870, the said Edwin executed a deed, conveying to Mrs. Stickney his undivided interest in said property, which deed was duly recorded; that the said William "had conveyed to Mrs. Stickney his undivided one-fourth interest in his father's estate, of which he was possessed, before his sister Emma's death, and that the deed conveying said interest was duly executed, prior to the death of his sister Emma, and upon a valuable consideration; that the only right to said William's one-twelfth interest in said real estate, acquired through his said sister Emma, claimed by Mrs. Stickney, was under and through said verbal agreement, and the adverse possession thereof as aforesaid;" and that after said verbal agreement, neither the said William nor the said Edwin ever asserted any right, title, claim or interest in or to the share of the said Emma in said property.

"Plaintiff then introduced evidence tending to show that Edwin and William Owens were in possession of said stables and stable lot [a part of the property in controversy] in the spring of 1870, and at the time of the execution of said mortgage; and there was also evidence introduced by defendants, tending to show that the said William and Edwin Owens, while



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in possession as aforesaid, at the time of the execution of said mortgage, were there as the tenants, and employees of the defendants Stickney and wife, and in no other capacity. The said plaintiff also testified that he had no knowledge of the claim or title of Mrs. Stickney to the interest of her said brother William in said Emma's one-fourth of said property described in said mortgage."

The foregoing was the substance of the evidence introduced on the trial bearing on the questions decided by the court. The plaintiff reserved numerous exceptions to charges given and refused, which the opinion does not render necessary to set out.

Those charges are here assigned as error.

TROY & TOMPKINS and DAVID CLOPTON, for appellant.

RICE & WILEY, BRAGG & THORINGTON and JOHN G. WINTER, *contra*.

SOMERVILLE, J.—We discover no error in the rulings of the circuit court, as shown in the present record.

In *Collins v. Johnson*, 57 Ala. 304, it was decided that an uninterrupted, continuous possession of lands by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, and will be protected by the statute of limitations, thus maturing into a good title by the lapse of ten years. The fact is immaterial that such a parol gift of lands conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar of the statute is complete. It is evidence of the beginning of an adverse possession by the donee, which can be repelled only by showing a subsequent recognition of the superiority of the title of the donor. The essence of adverse possession is the *quo animo* or intention with which the possession is taken and held by a defendant. It is, in the settled language of the books, the *intention* which "guides the entry, and fixes its character."—Angell on Lim. § 386; *Ewing v. Burnet*, 11 Peters (U. S.), 41. Even where the technical relation of landlord and tenant exists, and despite the settled rule that a tenant will not be permitted to dispute the title of his landlord, there is no principle of law or of public policy which forbids a tenant from holding adversely to the landlord, so as to acquire title of the demised premises under the operation of the statute of limitations. But in all such cases, the presumption in the first instance is, that the tenant's possession is permissive and in subordination to the title of the landlord, and there must be clear and positive proof of a disclaimer or renunciation of the superior title, brought home

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to the knowledge of the landlord with unquestionable certainty.—Angell on Lim. § 444; 2 Brick. Dig. p. 200, §§ 101, 102.

The evidence tended to show that the defendants held adverse possession of the lands in suit for more than ten years prior to the commencement of the action. The undivided interest of Emma Owen, which on her death descended in part to her two brothers, William and Edwin, was released by parol to their other sister, Mrs. Stickney, who is one of the defendants. Her adverse possession commenced at this time, which was about the middle of March, 1869, and is shown to have continued, without any subsequent recognition of the title of her donors, until the commencement of this suit, in May, 1880. The mortgage executed by the two brothers to Vandiveer, the plaintiff, in June, 1870, did not change the adverse nature of Mrs. Stickney's possession, nor operate in any manner to stop the running of the statute.

This mortgage, moreover, is shown to have been executed by the mortgagors during the period of Mrs. Stickney's occupancy and adverse holding, the hostile character of which was not only known to them, but, in its inception, was expressly authorized by their parol release of the deceased sister's interest in the mortgaged lands. The mortgage was therefore void as tending to promote champerty and maintenance by traffic in litigated titles. The rule of law rendering conveyances of lands void, when held adversely, is, in part, one of public policy, designed to "throw obstacles in the way of asserting doubtful rights to the prejudice of occupants."—*Clay v. Wyatt*, 6 J. J. Marsh. 583; *Bernstein v. Humes*, 60 Ala. 582. "It seems," says Chancellor Kent, "to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath the capacity as well as the intention to deliver possession."—4 Kent. 448.

To avoid a conveyance on this ground, it is not requisite that such adverse possession should be asserted under any color of title, but only under claim of right. But it must be *actual* as distinguished from constructive possession.—*Bernstein v. Humes*, 71 Ala. 260; *Eureka Co v. Edwards*, *Ib.* 248 Nor is it required that the mortgagee, or other purchaser should have actual notice of such adverse holding, in order to vitiate the conveyance. The constructive notice implied from possession is sufficient.—*Bernstein v. Humes*, *supra*.

Nor, yet again, does a knowledge by one in actual possession, claiming title, that his title is defective, avail to destroy its adverse character. The test is the actual claim, and not the *bona fides* of it, in all cases, at least, where the possession is actual and not merely constructive.—*Smith v. Roberts*, 62 Ala. 83 ;

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*Alexander v. Wheeler*, 69 Ala. 332 ; *Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232.

These principles are all pertinent to the present case, and were recognized in the rulings of the court.

The doctrine settled in this State is, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter. The reason is, as observed in a former decision, that an inquiry of the occupant will be likely to lead to a knowledge of the fact that he is a mere tenant, holding, not in his own right, but in the right of another who is his landlord.—*Brunson v. Brooks*, 68 Ala. 248 ; *Pique v. Arsdale*, 71 Ala. 91 ; *Wade on Notice*, §§ 284-286 ; *Burt v. Cassety*, 12 Ala. 734.

It was immaterial, therefore, that the mortgagors were in the temporary occupancy of a portion of the property sued for at the time of the execution of the mortgage, in the year 1870, provided they entered after the commencement of Mrs. Stickney's adverse possession, and as mere tenants, fully recognizing the superiority of her title as owner and landlord. Purchasers from tenants are as fully precluded as the tenants themselves, from disputing the title of their landlord.—*Taylor's Land. & Ten.* § 91 ; *Bishop v. Lalouette*, 67 Ala. 197. The principle settled in *McCarthy v. Nicrosi*, 72 Ala. 332, does not conflict with this view. There the possession of the vendor and purchaser was joint, both being in actual possession at the time the deed was executed. It was held that, in as much as there was no visible change of possession, a third person purchasing would not be charged with constructive notice of the unrecorded deed of the first vendee. If, however, the vendor had openly and visibly yielded exclusive possession to the vendee, and had afterwards gone in as a mere tenant, the rule would have been otherwise. Such is this case, in fact, as well as in principle and legal effect.

Judgment affirmed.

## Kelly v. Hancock.

### *Statutory Real Action in the Nature of Ejectment.*

1. *Evidence ; admissibility of.*—In ejectment by a widow to recover a portion of the decedent's lands which had been assigned to her as dower, and which, by parol contract, she had sold, but had never conveyed, it being a disputed question, under the plea of the statute of limitations, whether she had been fully paid for the lands so sold by her, the fact that she did not file a claim for any part of the purchase-money



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against the insolvent estate of the deceased purchaser, is admissible in evidence against her, as a circumstance, to be weighed by the jury, with the other testimony, in determining whether any part of the purchase-money remained unpaid.

2. *Decree in equity ; extent of operation as an estoppel.*—The purchaser from the widow having also purchased from the decedent's administrator the estate's interest in the entire tract out of which the dower had been assigned, including the reversion in the dower portion, and having died without paying therefor, a bill was filed against his heirs (to which the widow was also made a party defendant), to enforce a vendor's lien for the unpaid purchase-money, setting forth the allotment of dower to the widow, with a description of the land so allotted, the extent of the purchase from the administrator, and that it embraced only the reversion in the dower land, and seeking no relief against the widow. She having made no defense by answer or otherwise, on the hearing a decree was entered, ordering a sale of the entire tract, without mention of the dower claim, or any particular estate in any of the land ; and, under this decree, a sale and conveyance were made, purporting to be also of the entire tract. *Held*, that the decree must be referred to the claim set up in the bill, and that the widow is not thereby estopped from asserting her title to the dower land.

3. *Rule of repose as applied to possession of land.*—A son of the widow having become the purchaser at the sale under said decree, and having taken possession under his purchase, and continued therein until his death, and she, after being out of possession from the time she sold the dower land, having returned and resided with him until his death, when she again surrendered possession, *it was further held*, that if the son claimed the absolute and exclusive ownership of the entire tract, his mother residing with him merely as a member of his household, and asserting no claim herself, after the lapse of twenty years from the time she surrendered possession to the purchaser of the dower land, the law would presume against her payment therefor, a conveyance thereof, or any thing else, to quiet a possession which had so long remained undisturbed ; but that no such presumption could be indulged against her, if her son's possession was in recognition of her rights, she asserting title to the dower land while she resided with him.

APPEAL from Madison Circuit Court.

Tried before Hon. H. C. SPEAKE.

This was a statutory real action in the nature of ejectment, brought by Julia J. Hancock against Solon and Emmett Kelly ; and was commenced on 21st June, 1881. The defendants pleaded, in short by consent, (1) not guilty, (2) the statute of limitations of ten years, and (3) the statute of limitations of twenty years ; and upon issue joined on these pleas the cause was tried, the trial resulting in a verdict and judgment for the plaintiff.

As shown by the evidence, Robert Hancock died in 1856, leaving the plaintiff his widow, and seized and possessed in fee of a tract of land in Madison county, containing six hundred and forty acres, of which, on 4th April, 1857, two hundred and thirteen acres, the lands sued for in this action, were duly allotted to the plaintiff as dower ; and on which was situated the dwelling house of plaintiff's husband, where he had resided for many years prior to his death. On 18th October, 1858, "the

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reversionary interest in said dower land, together with the fee simple of the balance of said tract of six hundred and forty acres, was duly sold" by John Seay, as the administrator of said estate, pursuant to a decree of the probate court of said county, to William M. Gooch, who also purchased from the plaintiff her estate in the dower land for \$4000, one-half of which was paid in cash. This latter purchase was made through said Seay, as plaintiff's agent, and does not appear to have been in writing. Gooch, having taken possession under his purchase, continued therein until his death, which occurred a few years afterwards. He having failed to pay for the lands bought by him at the administrator's sale, after his death a bill was filed in the chancery court to enforce a vendor's lien thereon for the unpaid purchase-money; and, in 1867, the entire tract was sold under a decree rendered in the cause made by said bill, as is more fully stated in the opinion. At this sale John W. Hancock, the son of said decedent and of the plaintiff, became the purchaser, receiving a conveyance purporting to convey the entire tract to him. He took possession and continued therein until his death, in November, 1880. The defendants claim under John W. Hancock, as shown in the opinion. In January or February, 1858, the plaintiff went to Winchester, Tennessee "for the purpose of educating her children." In 1867, she returned to this State from Tennessee, and resided in the dwelling house on said dower land, with her said son, until his death, in November, 1880; and after his death, she continued to reside in said house until January, 1881, when she left it.

The other facts disclosed by the evidence, and the exceptions reserved in the court below, so far as passed on by this court, are sufficiently stated in the opinion.

CABANISS & WARD, for appellants. (1) If Gooch paid Mrs. Hancock the purchase-money for the dower in full, his possession became adverse.—1 Brick. Dig. p. 50, § 15. John W. Hancock succeeded Gooch in this adverse possession by virtue of the register's deed to him. This adverse possession for ten years, exclusive of the war, had the effect to invest John W. Hancock with the legal title, without any conveyance from Mrs. Hancock.—1 Brick. Dig. p. 51, § 41. Whether Gooch had paid Mrs. Hancock in full or not, was therefore, a material inquiry, determining the character of his possession. Her admission of full payment had been proved; but she denied it. That she had failed to make any claim against his estate, was a circumstance that the jury might well have weighed, with her admission, against her denial. The record showing this failure was, therefore, competent evidence. (2) Payment of a part of the purchase-money and going into possession by the

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purchaser took the contract out of the statute of frauds.—Code, 1876, § 2121, subd. 5. The charge requested by appellant should have been given. (3) The plaintiff was a party to the bill filed to enforce payment of the unpaid purchase-money due the estate of her husband. The decree authorized the sale of the entire tract; that decree stands unreversed, and is now conclusive on the plaintiff. This point discussed with following citation of authorities: 2 Brick. Dig. 145, § 203; *Ib.* 145, § 204; *Ib.* 145, § 206.

D. D. SHELBY, *contra*, after discussing other questions raised by the record, contended that the plaintiff's right to maintain this action was in no way affected by the proceedings and decree in the suit brought to enforce the vendor's lien for the unpaid purchase-money due the estate of plaintiff's husband, citing the following authorities: Freeman on Judgments, § 271; Wells' Res Adj. § 225; *Ib.* §§ 226–7; 2 Whart. on Ev. 785, note 1, and cases cited; *Fellows v. Hanlow*, 20 Cal. 450; *Riley v. Johnson*, 38 N. Y. 63; *Coit v. Tracy*, 8 Conn. 267; *Bradford v. Bradford*, 5 Conn. 127; *Phillips v. Thompson*, 3 Stew. & Port. 369; *Hopkins v. Lee*, 6 Wheat. 109; *McCalley v. Robinson*, 70 Ala. 432.

STONE, J.—The defendants below, appellants here, offered to prove that Mrs. Hancock did not file her claim for unpaid purchase-money of her dower interest against the insolvent estate of W. M. Gooch. This was ruled out. Certainly this failure is by no means conclusive evidence that she had no such claim. Many reasons may be supposed why she did not then prefer a claim, and it may be that a satisfactory reason can be shown why it was not done. But whether or not there was such valid, subsisting, unpaid claim, was one of the disputed questions on the trial. We think this testimony ought to have been received, to be weighed with the other testimony, in determining whether there was such unpaid balance. If the purchase-money was paid in full, then the holding became adverse, and would perfect a bar in ten years from that time. The war intervening, the actual time necessary to perfect a bar would be extended to fourteen years, eight months and ten days, of independent, or adverse holding. The circuit court erred in ruling this testimony out.

We do not say such testimony would, *per se*, bar a recovery. Such failure to file is only a surrender of all right to go against the insolvent estate. It is no abandonment of the right to recover the land, nor of the right to enforce a vendor's lien upon it, if such right be asserted in time. It is, as we have said, only a circumstance to be weighed by the jury in deter-



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mining whether, in fact, there remains unpaid purchase-money. And to that extent, it is only important, as bearing on the question of time necessary to perfect a bar.—*Walker v. Crawford*, 70 Ala. 567.

The circuit court did not err in rejecting the trust-deed made by Mrs. Hancock to indemnify Scruggs, her acceptor. On its face it does not tend to prove any thing material to the issue being tried, and nothing was offered in connection with it, tending to show its materiality. We can not perceive how proof that a debt contracted by Mrs. Hancock to Scruggs, Donegan & Co., even though never paid by her, can tend to prove that Gooch, a stranger to the transaction, had either paid the bill, or paid a debt he owed to Mrs. Hancock.—*Seals v. Edmondson*, 71 Ala. 509.

It is among the undisputed facts in this record, that dower in the lands sued for was allotted to Mrs. Hancock, before the larger tract out of which it was carved was sold under decree of the probate court, as of the estate of her deceased husband, Robert Hancock; that at such sale Gooch became the purchaser of the entire tract, but only purchased the reversion in that part which had been assigned as dower; and that the interest he acquired in the dower estate, was by virtue of an independent purchase from Mrs. Hancock, through her agent. The purchase-money to be paid for the estate's interest in the lands, was payable to Seay, the administrator. By an independent contract, Gooch purchased the dower interest of Mrs. Hancock, and by that contract bound himself to pay the purchase-price to her. He obtained title from neither vendor. He took possession under his several purchases, and retained possession until his death, a few years afterwards. He did not pay the purchase-money promised to the administrator, Seay. He paid one-half the purchase-price promised to Mrs. Hancock for her dower interest. Whether he paid the other, deferred installment, was one of the controverted questions in this trial. Mrs. Hancock left the premises as early as 1858, and did not institute this suit until 1881, about twenty-three years after surrendering the possession to Gooch.

A bill was filed against the heirs of Gooch to enforce a vendor's lien for the payment of the notes given to the administrator, in the purchase of the lands under the probate sale. Mrs. Hancock was made a defendant to that bill, and neither answered, nor made other defense. The bill set forth the extent of Gooch's purchase, and that it embraced only the reversion in that part of the land which had been allotted to Mrs. Hancock as dower. It also averred the allotment of dower to Mrs. Hancock, describing it by numbers, metes and bounds. The chancellor decreed a sale of the entire tract, without men-

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tioning the dower claim, or any particular estate in any of the land. The sale and conveyance under the chancellor's decree were made in the same way. John W. Hancock, son of Robert Hancock and of Mrs. Hancock, the dowress, became the purchaser, and received a conveyance from the register. This was in 1867, and John W., the purchaser, immediately took possession, his mother occupying with him. He and his mother continued to live together on the premises until 1880, when John W., the son, died. The lands were soon afterwards sold under mortgages executed by John W., and the brothers Kelly became the purchasers, and went into possession. The present action, as we have said, was brought in 1881, to recover the dower interest.

We have said above that Mrs. Hancock has never conveyed away her dower interest. On a material question in this cause, the testimony is in positive conflict. Some of the testimony tends to show, that from the time the Hancocks regained possession in 1867 until John W.'s death in 1880, he exercised exclusive ownership and dominion over the land, his mother claiming no interest, but simply enjoying a home and support at the hands of her son. Other testimony tends to show that during all that time Mrs. Hancock, being on the premises, asserted her claim to the dower estate, and that her son, John W., was cognizant of her claim, recognized it, and supported her in agreed consideration of its use. This is the pivotal point in this cause. The Kelly brothers have no chain of title to the dower interest, which dates behind the mortgages under which they purchased. If John W. held in recognition of his mother's ownership, then the present defendants acquired no title. The mother had, and still has the legal title, unless entry is tolled by lapse of time. The present occupants have acquired no title by virtue of their unaided possession. On the other hand, if Mrs. Hancock was in possession in right of her son, asserting no claim herself, but simply as a guest, or member of his household, then more than twenty years have run against her since she surrendered possession to Gooch, and the law will presume against her payment, conveyance, or any thing else, to quiet a possession which has remained so long undisturbed.—*McArthur v. Currie*, 32 Ala. 75.

And payment of the purchase-money promised by Gooch is only material, in so far as it affects the time necessary to complete a bar. Ten years independent holding, after full payment of purchase-money, bars a recovery even against a title otherwise valid.—*Tillman v. Spann*, 68 Ala. 102; *Barclay v. Smith*, 66 Ala. 230; *Clark v. Snodgrass*, *Ib.* 233; *Ryan v. Kilpatrick*, *Ib.* 332.

The charge numbered 3, given at the instance of the plain-  
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tiff, should not, in the state of the proof found in this record, have been given. That charge affirms that if no title was made, then the possession would not become adverse, until the whole purchase-money was paid. That is not reconcilable with what we have said above, and is not true, if, as part of the testimony tends to show, John W. Hancock took, claimed and held possession in his individual right. In that event, twenty years would perfect a bar.

The charge asked, to the effect that if Gooch paid part of the purchase-money and received possession, then the contract was as binding on Mrs. Hancock as if such contract had been in writing and signed by her, was rightly refused for several reasons. In the first instance, it raised an inquiry that was immaterial in this cause. If the plaintiff meant by contract in writing an executory agreement to convey, then each phase of the hypothesis would only confer an equitable right, which can neither be enforced nor considered in a court of law. In the second place, it mentions contract in writing, without discriminating between executory and executed contracts. This would be misleading and erroneous, in this: While such oral contract of sale, accompanied with possession and part payment of the purchase-money, is the equivalent of a written obligation to convey (Code of 1876, § 2121), yet it is not the equivalent of a conveyance, which is only a contract in writing.

It is contended for appellant that, inasmuch as Mrs. Hancock was made a defendant to the bill, under which the vendor's lien was enforced against Gooch's heirs, and acquiesced in the decree therein rendered, this amounts to *res adjudicata* against her, and estops her from maintaining her present claim. We can not assent to this. The bill itself shows that the dower interest was no part of the property purchased at the administrator's sale, and furnished no part of the consideration for the bonds or sealed notes the bill sought to collect. No lien existed against the dower estate, and none was asserted. There was no claim set up in the bill, which affected Mrs. Hancock's interest, and well might she abstain from offering any defense. We can not suppose the chancellor attempted to declare a lien, which the bill itself shows did not exist. The decree must be referred to the claim set up in the bill. See authorities on brief of counsel.

The judgment of the circuit court is reversed, and the cause remanded.



[Coffey v. Hunt.]

**Coffey v. Hunt.***Bill in Equity to enforce Landlord's Lien for Rent.*

1. *Rent an incident to, and passes with the reversion.*—Rent is an incident to the reversion and passes with it, in the absence of an express reservation in the transfer or assignment, whether the transfer or assignment is the voluntary act of the lessor, or results by operation of law, and whether it is an absolute conveyance, or a mortgage.

2. *Mortgage; right of mortgagee to possession and rents.*—A mortgage in fee, though executed to secure a debt falling due at a future day, operates as a present, immediate conveyance and transfer of all the right, title, interest and estate of the mortgagor in the mortgaged premises, and, in the absence of a reservation to the mortgagor of possession, or of the right to take and enjoy the rents and profits, until default in the performance of the condition, entitles the mortgagee to the present, immediate right of entry and possession, and to the rents subsequently accruing; and a subsequent assignment of the rents is subordinate to, and can not prevail against the prior grant of the reversion contained in the mortgage.

3. *When bill in equity can not be maintained for rent.*—Where land was rented for a part of the crop, and the tenant, after the rent became due, delivered the part of the crop stipulated to be paid by him as rent to a third party, who received it with notice, but under claim of title,—*held*, that a bill in equity can not be maintained by an assignee of the landlord against the tenant and the party receiving the rent, for its recovery, he having a clear, adequate and complete remedy at law.

APPEAL from Jackson Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on 27th March, 1883, by R. C. Hunt against R. A. Coffey, J. P. Timberlake, P. H. Helton and I. E. Moore; and the case made thereby is substantially as follows: On 14th January, 1882, by written contract, one J. F. Martin rented to the defendant Moore, for the year 1882, a certain farm situate in Jackson county, in this State, for ten bales of cotton of a designated average and classification; and under this contract Moore took possession of the rented land, and raised a crop of cotton thereon. At the time this contract was made, there was an unsatisfied mortgage on said farm, executed by Martin to one W. F. Hurt, since deceased, to secure a debt which became due on 8th April, 1880; and on 2nd October, 1882, said Hurt's executor sold said farm under a power contained in the mortgage, and at the sale the defendants Coffey, Timberlake and Helton became the purchasers. On 13th May, 1882, Martin executed to the defendants last above named a mortgage on said farm, "to secure them in the

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payment of \$2000 each, to become due on 1st January, 1883." This mortgage is not exhibited with the bill, nor are its terms or provisions stated. On 12th June, 1882, Martin made an assignment to the complainant "of all his property, both real and personal, which was unincumbered," for the benefit of certain of his creditors therein named, who had not "otherwise been provided for prior to that date;" and under this assignment the complainant claimed that he "became subrogated to all the rights of said Martin," and entitled to receive the cotton which Moore had agreed to deliver as rent. On 15th March, 1883, Moore delivered said ten bales of cotton to Coffey, Timberlake and Helton, who, as charged in the bill, claimed it under their purchase at the mortgage sale, and who, at the time, had notice of the assignment to the complainant. It is further charged in the bill, that a part of the debt secured by the mortgage executed by Martin on 30th May, 1882, "was the identical debt" secured by the mortgage to Hurt, which Coffey, Timberlake and Helton agreed to pay; that they further agreed not to suffer said farm to be sold under the mortgage to Hurt; and that, notwithstanding this agreement, they suffered said farm to be sold under said mortgage, and became the purchasers, with the view of claiming and collecting said rent. The prayer of the bill is, that the defendants be held liable to account to the complainant for the proceeds of the ten bales of cotton delivered by Moore to his co-defendants; that a decree be rendered against them for the amount thereof, with interest; and for general relief.

The defendants demurred to the bill on the ground that the complainant had a full, complete and adequate remedy at law, and also moved to dismiss it for want of equity. The chancellor caused a decree to be entered, overruling the demurrer and the motion to dismiss; and that decree is here assigned as error.

HUMES, GORDON & SHEFFEY and ROBINSON & BROWN, for appellants. It has been expressly decided that when the statutory lien exists, the remedy of the landlord against a purchaser who, having notice of the lien, receives and converts the crop, is by special action on the case; and he can not maintain a bill in equity, when it is not shown that the remedy at law is inadequate.—*Kennon v. Wright*, 70 Ala. 434; *Hussey v. Peebles*, 53 Ala. 432. It is not shown by the bill in this case that the remedy at law is not adequate and perfect; and the demurrer and motion should have been sustained.

R. C. HUNT, *contra*. (No brief came to the hands of the reporter.)

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BRICKELL, C. J.—1. There can be no proposition or principle of law more firmly settled, than that rent is an incident to the reversion, passing with it to the assignee. Without an express reservation, an assignment or transfer of the reversion, when rent is accruing and to fall due at a future day, carries with it the right to demand and receive such rent as it falls due and payable.—*Taylor's Land. & Ten.* § 448; *English v. Key*, 39 Ala. 113; *Tubb v. Fort*, 58 Ala. 277. Whether the transfer or assignment of the reversion is the voluntary act of the lessor, or involuntary, by act and operation of law, as in the event of a judicial sale of the reversion, or of a sale by the sheriff under execution at law, which is quasi-judicial, makes no difference in the application of the principle.—*English v. Key, supra*; *Bank v. Wise*, 3 Watts, 394. And it applies equally, whether there is an absolute conveyance of the reversion, or whether the conveyance is by way of mortgage.—*Birch v. Wright*, 1 D. & East, 383; *Burden v. Thayer*, 3 Metc. 76; *Kimball v. Pike*, 18 N. H. 419.

In this State the law is settled, that a mortgage in fee, as appears to be the mortgage executed by the lessor, Martin, to the defendants, Timberlake, Coffey and Helton, operates as a present, immediate conveyance and transfer of all the right, title, interest and estate of the mortgagor in and to the premises mortgaged. If there is not a reservation to the mortgagor, in the conveyance, of possession, or of the right to take and enjoy the rents and profits, until default in the performance of the condition (and of the existence of such reservation there is no averment in the bill), the mortgagee has the present, immediate right of entry and possession, and may, at will, eject the mortgagor, or tenants entering under him subsequent to the mortgage.—*Duval v. McLoskey*, 1 Ala. 737; *Welsh v. Phillips*, 54 Ala. 309.

The mortgage operating as an immediate transfer and conveyance of all the estate of the mortgagor, though its purpose was the security of debts falling due at a future day, included a present right of entry and possession, in the absence of a stipulation that the mortgagor should remain in possession, or should enjoy the rents and profits, until condition broken, and carried with it, necessarily, the rents subsequently accruing. The assignment of the rent to the complainant, subsequent in point of time to the mortgage, was subordinate to, and can not prevail against the prior grant of the reversion.—*Kimball v. Pike, supra*; *Otis v. McMillan*, 70 Ala. 46. The mortgage was a conveyance of, and binding upon the whole realty, of which the rent accruing was a part. It was optional with the mortgagees whether they would take such rent or not; as it is always matter of election with a mortgagee whether he will



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enter and take possession, before or after condition broken. It is with him matter of election, because, if he enters, or if he demands and receives rents, he is subject to account; and he may prefer standing upon the security of the mortgage, rather than to incumber himself with a liability to account for rents and profits. Therefore it is that, ordinarily, before condition broken, the mortgagor is left in possession, and suffered to enjoy rents subsequently accruing. But the right of the mortgagee to enter, or to demand and receive from a tenant having a prior lease, whose possession he can not disturb, rents subsequently accruing, remains optional, and he may exercise it *cum onere*.—*Burden v. Thayer*, *supra*; *Newall v. Wright*, 3 Mass. 138. It is not of consequence whether the mortgagees claimed the rent as purchasers under the prior mortgage to Hurt, or in their right as mortgagees. In the latter capacity they had the right to demand and receive the rent, superior to the right asserted by the complainant, and payment to them extinguished the rent and the liability of the tenant.—*Mansony v. U. S. Bank*, 4 Ala. 735; *Chambers v. Mauldin*, *Id.* 477; *Coker v. Pearsall*, 6 Ala. 542. The bill, consequently, upon its face, discloses a want of right and title in the complainant to the relief prayed, and the motion to dismiss ought to have been sustained.

2. When the right to recover rent is legal, not equitable, and there is an adequate remedy at law, a court of equity will not take jurisdiction to decree its recovery. The rule then applies, that a court of equity will not intervene for the enforcement of legal rights, when the remedy at law is clear, adequate and complete. But, if the remedy at law is doubtful or inadequate, or there is a peculiar equity, the court will take jurisdiction. *Tubb v. Fort*, 58 Ala. 277. In *Abraham v. Hall*, 59 Ala. 386, the tenant died, rendering it legally impossible for the landlord, by the pursuit of legal remedies, to enforce the statutory lien upon the crops raised upon the rented premises. As the lien is an incident of the tenancy, and there was a want of legal remedy for its enforcement, it was held that, in the exercise of its general jurisdiction to enforce liens, or trusts for the payment of debts, a court of equity could interfere, follow the crops into the hands of all others than a *bona fide* purchaser without notice, and enforce and render availing the lien. In *Westmoreland v. Foster*, 60 Ala. 448, there was an assignment of the rent, or, rather, of the promissory notes given for its payment, but there was not then a statute of force giving the assignee a remedy at law to enforce the statutory lien upon the crops grown on the rented premises. As there was a lien, an incident of the tenancy, a security for the payment of the rent, and a want of legal remedy for its enforcement, it was held, a court

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of equity had jurisdiction to interfere for its enforcement, original and inherent, not affected by subsequent legislation giving the assignee a remedy at law. In each case, there was a want of remedy at law, and the lien, the security for the payment of the rent, would have been unavailing, without *such* on the part of the party having the right, if the court had not intervened. But there is no authority for the intervention of the court, when there is a plain, adequate remedy at law, by the pursuit of which the party complaining can obtain all the relief claimed, or to which he is of right entitled. This principle must not, however, be regarded as infringing upon the general doctrine, that the original, inherent jurisdiction of a court of equity is not affected by statutes conferring a like jurisdiction on courts of law. The right of an assignee of rent to resort to equity for the enforcement of the statutory lien is not affected, because the statute now gives him a legal remedy. That question is not, however, now presented. If the complainant had a right to the rent, if it had been severed from the reversion, and had passed to him by the assignment, he would have a plain, unembarrassed remedy at law to recover of the defendants for the conversion of the cotton which was subject to the lien given by the statute to secure the payment of the rent. The defendants having, as it is averred in the bill, taken and converted the cotton, with notice of the lien, thereby rendering unavailing remedies for its enforcement, a special action on the case would be maintainable against them; and in that action, the recovery of the complainant, would be precisely co-extensive with that which he now claims, the value of the cotton, with interest from the conversion.—*Hussey v. Peebles*, 53 Ala. 432; *Hudson v. Vaughan*, 57 Ala. 609; *Lavender v. Hall*, 60 Ala. 214; *Lomax v. LeGrand*, *Id.* 537; *Boggs v. Price*, 64 Ala. 514. Or if the defendants had converted the cotton into money, or its equivalent, an action of *assumpsit* for money had and received would lie against them.—*Thompson v. Merriman*, 15 Ala. 166; *Westmoreland v. Foster*, *supra*. These plain and adequate remedies at law existing, there is no necessity or reason for the peculiar remedial process or functions of a court of equity; and if the bill were entertained, the court would and could act only as a court of law, administering no other relief than is obtainable in such court by the pursuit of the ordinary remedies. The demurrer to the bill was well taken, and ought to have been sustained. The decree is reversed, and the cause remanded for further proceedings in conformity to this opinion.

## Bernstein v. Humes.

### *Statutory Real Action in the Nature of Ejectment.*

1. *Admissibility in evidence of ancient documents.*—Under the facts of this case, a statutory real action in the nature of ejectment, it was held that the ruling of the primary court, in allowing the plaintiff, in support of his title, to read in evidence a duly certified transcript from the receiver's journal, a book belonging to the United States land office, showing that a party under whom the plaintiff claimed, had purchased the land in controversy in 1809, was free from error.

2. *Same.*—Nor did the primary court err in allowing the plaintiff to read in evidence transcripts of the records of deeds in the office of the judge of probate, executed in 1818 and 1833, under which the plaintiff claimed, although the deeds may not have been properly acknowledged, and not recorded within the time prescribed by the statute.

3. *Adverse possession of land; what necessary to avoid deed executed by party out of possession.*—To avoid a deed to land executed by a party out of possession, on account of the adverse possession of a third party, it is not required that the possession of the latter should have been under a *bona fide* claim of right to the premises, or under the honest belief that his title was good; it is sufficient if he claimed in independent right, adversely.

### APPEAL from Madison Circuit Court.

Tried before Hon. H. C. SPEAKE.

This was a statutory real action in the nature of ejectment, brought by Mrs. E. C. Humes and others against Morris Bernstein; was commenced on 12th July, 1871, and was tried on issues joined on the pleas of not guilty and the statute of limitations, the trial resulting in a verdict and judgment for the plaintiffs. The defendants also suggested of record adverse possession for three years next before the commencement of the suit, and the erection by them of permanent improvements.

The controversy was mainly over a part of lot numbered 17 in the city of Huntsville, fronting on Gallatin street thirty-nine feet, the measurement commencing ninety-nine feet from the north-west corner of said lot, and running in a southerly direction. The lot is situated in a square which is bounded on each of its sides by a street, Gallatin street binding it on the west. This square was originally divided into four lots of equal dimensions; and lot numbered 17 was the north-west quarter of the square; and of that lot the defendant owned the north-west corner, having acquired it by purchase and conveyance from one Chappell, on 21st December, 1861, who, on



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the day before, had acquired it from Battle and others, who, in turn, claimed under a deed executed by a Mrs. Hill, in 1858. The plaintiffs owned the greater part, if not all the balance of said square, their land adjoining that of the defendant on the east and south. They claimed the land sued for "as a part of the old Bell tavern lot," and they trace their title, by documentary proof, from the government; the descriptions, however, in their later deeds being of so general a character as to require proof *aliunde*, to identify the premises conveyed. The evidence introduced on behalf of the defendant tended to show that he took possession of the premises sued for soon after his purchase from Chappell, and that he was in possession thereof in May, 1871, when L. P. Walker conveyed it, with other property, to the plaintiffs. The character of this possession, however,—whether adverse to the plaintiffs or otherwise—was one of the disputed questions of fact in the lower court, and was submitted to the jury on the evidence. The conveyance by Walker to the plaintiffs is referred to in the opinion as the deed from Walker to Chapman. For a full statement of the chains of title relied on by the respective parties, see the reports of this case on the last two appeals.—*Bernstein v. Humes*, 71 Ala. 260; *Humes v. Bernstein*, 72 Ala. 546.

As recited in the bill of exceptions, "the plaintiffs, for the purpose of showing that a patent for the south-west quarter of section thirty-six, in township three, range one, west, in Madison county, Alabama, embracing the lot of land in controversy, had been issued by the Government of the United States to Leroy Pope in the year 1809, introduced John M. Cross as a witness, who testified that he was the register of the United States land office in Huntsville, Alabama; that he found in his office patents for other lands in the same township, dated in 1809, but none for said quarter section, and that patents issued by the United States were recorded in Washington City. In connection with the testimony of said Cross, the plaintiffs offered in evidence a duly certified transcript from the receiver's journal, a book belonging to said land office, of August 25th, 1809, in words and figures as follows:

'RECEIVER'S OFFICE AT NASHVILLE, )  
August 25th, 1809. }

Sundries, Dr. To sales of public land, forward . . . . . \$2998.62.  
Leroy Pope, of Petersburg, Georgia, for three thousand seven hundred and sixty-three dollars, twenty-nine cents, being the amount of the purchase-money of south-west quarter of section thirty-six, in township 3, of range 1, west, containing 160 14-100 acres at \$23.50. Purchased on the 25th of August, 1809, as appears by the register's return. . . . . \$3763.29.'

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The defendant objected to this transcript as evidence, on the ground that a transcript of the record of the patent was better evidence. The court overruled the objection, and allowed the transcript to be read to the jury, and the defendant excepted." As a part of their chain of title, the plaintiffs offered in evidence a transcript of the record of a deed purporting to have been executed by David Cannon and his wife on 28th December, 1818, in the presence of two witnesses, and to convey the land in controversy, with other land, to Hugh and Daniel Price. This deed, by the certificates thereon, also purports to have been filed for record on 23rd November, 1822, to have been acknowledged by David Cannon on 13th March, 1823, and to have been recorded five days thereafter. The certificate of acknowledgment purports to have been made by the clerk of the county court of Madison county, and states, in substance, that David Cannon, whose name is subscribed to the deed, personally appeared before said clerk, and acknowledged "the signing, sealing and delivery of the same" to the grantees, "for the purposes therein named on the day of its date." To the transcript thus offered the defendant objected, because "it was not shown that the deed had been acknowledged or proved according to law, and because it showed that the deed had not been recorded within twelve months from its date." The court overruled the objection, allowed the transcript to be read to the jury, and the defendant excepted. The plaintiffs also offered a transcript of the record of another deed in his chain of title, purporting to have been executed in 1833. To this transcript the defendant objected on the ground that it did not show that the deed had been recorded within twelve months from its date; but the court overruled the objection, and the defendant excepted.

Charge 17, given by the court at the request of the plaintiffs, and referred to in the opinion, is in these words: "If the jury believe from the evidence, that Bernstein, at the time Walker conveyed the property in dispute to the plaintiffs, was in possession of the same by himself or tenant, but was not in such possession adversely, claiming *bona fide* to have the right thereto, then the court instructs the jury that plaintiffs have shown such a complete chain of title by the deeds introduced, as will support a recovery, and that upon such title, if the jury believe such evidence, the plaintiffs are entitled to recover." To the giving of this charge the defendant excepted.

The rulings above noted, together with numerous others not necessary to be here set out, are assigned as error.

BRANDON & JONES and CABANISS & WARD, for appellant.

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L. P. WALKER and HUMES, GORDON & SHEFFEY, *contra*.

STONE, J.—We are not inclined to enter into the inquiry, when ancient documents may be read in evidence, without proof of their execution. Nor will we discuss that other question, when certified copies may be used without accounting for the originals, the contest arising between parties who are presumed not to have the custody of the originals. There is testimony in the record tending to show that, at some time before Bernstein acquired his title, the lot in controversy, or a part of it, was used and occupied as part of the Bell tavern property. Possibly the stable, partly brick and partly framed, covered a part of the lot sued for. Proof by some of the witnesses tends to show that Mrs. Hill, a former owner of the lot to which Bernstein has a deed, at some time occupied a part of the premises sued for, as a cow lot. The dust of years has settled on the transactions brought to view in the testimony, and human memory is not infallible. Some of the witnesses must be mistaken, for they are in conflict. Be the true facts as they may, we hold that the rulings of the circuit court, in receiving the ancient deeds and copies of them in evidence, are free from error.—*White v. Hutchings*, 40 Ala. 253; 1 Greenl. Ev. § 145, and notes; *Sharpe v. Orme*, 61 Ala. 263; *Baker v. Prewitt*, 64 Ala. 551; *Beall v. Dearing*, 7 Ala. 124.

This is the fourth appeal in this cause: *Bernstein v. Humes*, 60 Ala. 582; s. c. 71 Ala. 260; *Humes v. Bernstein*, 72 Ala. 546. We had hoped we had declared the principles so clearly that the case would not return upon us. Among other things, we have said, in substance, that if the lot in controversy is south of the seven feet alley—in other words, more than ninety-nine feet south of the north-west corner of lot seventeen,—then Bernstein has shown no documentary title to it. We further said if Bernstein took or held possession with no intention of claiming the property if not embraced in his deed, and if in fact his deed does not embrace it, then his possession was not adverse, so as to ripen into a title by ten years of such occupancy, nor would it avoid a conveyance by the rightful owner, not in possession. We said further, that if he and those under whom he claimed, had been in continuous adverse possession, claiming to hold as of right for fourteen years, eight months and ten days, then such adverse holding perfected a title in him, although he knew he had no title in the beginning. The question, in this aspect of the case, is whether he claimed, right or wrong—that is, whether he had title or not,—or whether he claimed only in the event he had title. And the same rule applies to the other phase of the question. If he was in adverse possession, claiming the right to hold the property whether



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his title embraced it or not, then Walker's deed to Chapman, made while Bernstein was so in adverse possession, was invalid, and conveyed no title which will maintain a suit. On the other hand, if Bernstein was in possession, claiming the lot only in the event it was covered by his deed, then if his deed does not embrace it, such possession, no matter what acts of ownership he may have done and performed, will not invalidate the deed of Walker to Chapman; and this line of the defense must fall. *Smith v. Roberts*, 62 Ala. 83; *Clark v. Snodgrass*, 66 Ala. 233; *Alexander v. Wheeler*, 69 Ala. 332. The circuit court erred in the seventeenth special charge given at the instance of plaintiffs. It required that, to avoid Walker's deed to Chapman, Bernstein's possession should have been under a *bona fide* claim of right to the premises. This was equivalent to requiring that Bernstein should have had the honest belief that his title was good. It was enough that he claimed in independent right, adversely.

Reversed and remanded.

BRICKELL, C. J., not sitting.

## Fulgham v. Morris.

### *Bill in Equity to foreclose Chattel Mortgage.*

1. *Bill to foreclose mortgage by assignee of debt; when mortgagee a necessary party.*—While in equity an assignment of a debt secured by a chattel mortgage, if not otherwise expressed, operates an assignment of the mortgage, entitling the assignee to its foreclosure, yet, the mortgagee, having the legal title, is an indispensable party, in whose absence the court will not proceed to a decree.

2. *Mortgage securing debt payable in installments; when may be foreclosed.*—When a debt secured by mortgage is payable in installments, ordinarily, and in the absence of stipulations to the contrary, the mortgage is forfeited *pro tanto* by default in the payment of any installment as it falls due, and the mortgagee may proceed to a foreclosure; and if before final decree, other installments become due, they should be embraced in the decree.

*Same; effect of payment of past due installment after bill filed.*—The mortgagor, by paying the installments of such debt which are past due, after bill filed for a foreclosure, is entitled to put a stop to further proceedings; and, if he make such payment, the court has no power to render a conditional or provisional decree of foreclosure, if default should be made in the payment of the installments falling due in the future.

APPEAL from Jefferson Chancery Court.

Heard before Hon. THOMAS COBBS.

[Fulgham v. Morris.]

This was a bill in equity, filed on 11th April, 1883, by Wm. H. Morris and J. N. Hall against N. W. Fulgham and G. W. Marshall, to foreclose a chattel mortgage executed by Fulgham on 10th January, 1882, to W. K. Rosser and S. B. Ethridge, to secure an indebtedness of \$2500, payable in installments, evidenced by promissory notes. The notes remaining unpaid at the time the bill was filed, amounting in the aggregate to \$800, had been assigned to the complainants; and two of them, each for \$100, were at that time past due. The other notes did not mature until after the decree was entered. There was no assignment of the mortgage, carrying with it the legal title; and Rosser and Ethridge, the mortgagees, were not made parties. Marshall was in possession of the property, claiming under Fulgham; and he was, therefore, made a party defendant. An amendment was allowed before answer, setting up a transfer from Hall to Morris of his interest in the secured debt, after the filing of the bill. Fulgham, in said mortgage, covenants and agrees: "If I pay said notes for which this mortgage is given, as they fall due, as above stated, then this conveyance is to be void. But if I fail to pay said notes, as above stated, and as they fall due, then the said W. K. Rosser and S. B. Ethridge shall have the right to take charge of said property," and, after selling it at public auction, they shall "devote the proceeds of said sale, 1st, to the payment of the cost of selling said property; 2nd, to pay off such amount as may then be due upon said notes, and, 3rd, to pay the balance, if any," to the said mortgagor.

The answer, among other things, denied that any of the notes were "due and unpaid;" and the proof showed that the two notes, which were past due at the time of the filing of the bill, were paid before the answer was filed.

On the hearing, had on pleadings and proof, the chancellor caused a decree to be entered, declaring that the complainants were entitled to a foreclosure, finding that the two notes which were past due and unpaid at the filing of the bill, were thereafter paid, and that the other secured notes fell due at stated times in the future, and decreeing, in substance, that a sale of the mortgaged chattels be suspended until there should be a default in the payment of any one of the unpaid secured notes; in which event the property should be sold, and out of the proceeds the register should "retain the cost and expenses of said sale, and apply a sufficiency thereof to the payment of the notes due the complainants which have matured, and of the residue hold a sufficiency for the payment of the note or notes yet to fall due;" and the remainder, if any, he is directed to pay over to the solicitors of the defendants. That decree is here made the basis of the assignments of error.

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R. H. STERRETT, for appellants.

R. H. PEARSON, *contra*.

BRICKELL, C. J.—1. A mortgage of chattels passes the legal title to the mortgagee, and if he assigns the mortgage debt, without an assignment of the mortgage, the legal title remains in him. In a court of equity the assignment of the debt, if not otherwise expressed, operates an assignment of the mortgage, entitling the assignee to proceed to its foreclosure. But the mortgagee, having the legal title, is an indispensable party, in whose absence the court will not proceed to a decree, for the reason that the decree would not bind the legal title, and could not, without the peril of future litigation, be performed safely.—*Prout v. Hoge*, 57 Ala. 28; Story's Eq. Pl. § 118. The mortgagees not being parties, the bill was defective, and no decree of foreclosure could have been properly rendered thereon.

2. A mortgage in equity is a mere security for a debt, and if the debt is payable by installments, in the presence of such stipulations as are found in this mortgage, or in the absence of stipulations to the contrary, it is forfeited *pro tanto* by default in the payment of any installment as it falls due, and the mortgagee may proceed to foreclose. If before final decree, other installments become due, they should be embraced in the decree. The court may decree a sale of the entire property, or a sale of so much as will satisfy the installments due and unpaid, or a sale subject to the payment of the installments falling due in the future. If a sale of the entire property is decreed, and it is not made subject to the payment of the installments falling due in the future, the court should direct that the decree should stand as a security for the payment of future installments, and that any surplus of the proceeds of sale should be brought into court, to await further orders and decrees when the remaining installments are due and payable.—*Mussina v. Bartlett*, 8 Port. 277; *Levert v. Redwood*, 9 Port. 79; *Walker v. Hallett*, 1 Ala. 379; *McLean v. Presley*, 56 Ala. 211. The mortgagor, by paying the installments which are due, is entitled to put a stop to further proceedings.—*Mussina v. Bartlett*, *supra*; *Saunders v. Frost*, 5 Pick. 259. There is no power in the court, if he make such payment, to render a conditional or provisional decree of foreclosure, to take effect if there should be default in the payment of the installments falling due in the future.—*Smith v. Smith*, 32 Ill. 198.

The decree of the chancellor is erroneous and must be reversed, and a decree will be here rendered dismissing the bill at the costs of the complainants and the defendant Fulgham



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equally, without prejudice to the right to file a new bill, if there should be default in the payment of such of the installments as were unpaid, and falling due in the future, when the decree was rendered by the chancellor.

## The Medical and Surgical Society of Montgomery County v. Weatherly.

*Application by Corporator, Wrongfully Disfranchised, for Mandamus to compel Restoration.*

1. *Corporator wrongfully amoved or disfranchised ; when mandamus lies to restore.*—The writ of mandamus will be awarded against a private corporation, at the instance of one of its members who has been disfranchised or amoved, to compel his restoration to membership, and to the enjoyment of corporate franchises, when the cause of disfranchisement or amotion is in law insufficient, or where the proceedings are irregular, as tested by the charter or by-laws of the corporation ; but, in such case, no inquiry can be had into the merits of what has been regularly done, in the due course of proceeding.

2. *Penal provisions ; how construed.*—The principle, that penal provisions, especially when summary in character, and operative to produce a forfeiture of valuable rights, are to be strictly construed, is as applicable to the by-laws and regulations of voluntary societies, whether incorporated or not, as to constitutional and statutory enactments and municipal ordinances.

3. *Constitution of voluntary association ; binding on corporation.* While the constitution of a voluntary association may be in the nature of a contract between the members, who are bound by its provisions, by reason of express assent in assuming the obligations of membership, such constitution is equally binding upon the society in its corporate capacity.

4. *Same ; forfeiture not favored.*—While it may be competent for a member of a voluntary association, incorporated in this State, to bind himself by agreement to forfeit his membership upon a specified condition, and such forfeiture may be made to take effect at a time fixed, without special or personal notice to him, a construction leading to such a result will not ordinarily be adopted by the courts, unless the intention to waive notice may be inferred from uniform custom in the particular business, or is clearly expressed in the most unambiguous and explicit language.

5. *Disfranchisement or amotion of member of voluntary society ; nature of power, and how exercised.*—The power to disfranchise a member, or to remove an officer generally resides in the body of every corporate society, is judicial in its nature, and must be exercised by a vote of the society, expressing the corporate will ; and, ordinarily, the records or minutes of the body must show that the requisite steps were taken in compliance with the charter and by-laws of the corporation, after reasonable notice to the party charged, either express or implied.

6. *Same ; what merely a ground of forfeiture of membership.*—The constitution of a voluntary medical society, incorporated in this State, after providing that every member shall pay into the treasury a designated

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annual contribution, to become due and payable on 1st January of each year, declares that if the contribution is not paid by the first meeting in April thereafter, the defaulter shall *forfeit his membership*, and his name shall be stricken from the roll of members, "and of this he shall be duly notified by the secretary;" and imposes upon the treasurer the duty of serving, on or about 1st March of each year, upon every member in arrears a written notice, calling his attention to the foregoing requirement. It is further declared that "the first regular meeting in April of each year shall be the regular meeting for the revision of the roll of members," at which the treasurer is required to report "the names of all members whose dues for the year have not been paid," and all such names "shall be immediately stricken from the roll," the treasurer being declared "personally responsible to the society for the dues of all defaulting members not so reported;" and by another article relating to the duties and office of treasurer, it is further provided as follows: The treasurer "shall report to the society, at the annual meeting for the revision of the roll, a written statement of the names of members who are in arrears for the dues of the year so that they may be stricken from the roll; and he shall himself be held personally responsible for the dues of all delinquents whom he fails to report; but this written statement shall not be spread upon the minutes." Another article provides in detail for the order of business at what is designated as "the regular meeting for the revision of the roll," specifying, *inter alia*, "the treasurer's report of members in arrears," and the "revision of the roll by the secretary;" and, in another article, it is declared that "any one of these orders of business may be suspended at any time by the vote of a majority of the members present at any meeting. *Held*,

(a) That these several provisions being construed *in pari materia*, as they should be, the non-payment of annual dues by a member, by the first meeting in April, is not, *ipso facto*, a forfeiture of membership, but only a ground of forfeiture, in the nature of a judgment *nisi*, to be made final by the vote of the society.

(b) That, no statement or report having been made by the treasurer at the regular meeting in April, as required by the constitution, and no vote of the society having been taken on the subject, the mere reading, at that meeting, of the name of a member from a book as a delinquent, did not operate a forfeiture of his membership.

(c) That the action of the society at a subsequent meeting, of which such delinquent had no notice, actual or constructive, declaring a forfeiture of his membership for non-payment of dues, was irregular and not binding on him, and, on his application, *mandamus* will lie to vacate it, and restore him to membership.

APPEAL from City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

This was an application by J. S. Weatherly, a licensed and practicing physician, residing in the city of Montgomery, for a writ of *mandamus* against the Medical and Surgical Society of Montgomery County, a body corporate, to compel the respondent to restore the relator to membership and office in said society. The petition, after averring the incorporation of the society by an act of the General Assembly of this State, approved February 6th, 1866, and the subsequent adoption of a constitution for its government, and after setting out certain provisions of that constitution, the portions of which necessary to an understanding of the points decided, are stated in the opinion, avers

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that shortly after the incorporation of the society, the relator was duly elected and admitted a member thereof; that at a regular meeting of the society, in January, 1880, the relator was elected a member of the Board of Censors, a board provided for by said constitution, and he has ever since acted as a member of said board; that at the first regular meeting in April, 1884, the treasurer of the society, made a verbal report, that relator was in arrears for his dues for the year, when the president directed the secretary to strike relator's name from the roll of members, and thereupon his name was stricken from the roll; that no written statement of the names of the members of the society who were in arrears for the dues of the year, was reported or made at said meeting, or at any other meeting, by the treasurer; that, at no time, was any vote taken, or resolution adopted, or trial had by the society, by which it was declared or determined that the membership of relator had been forfeited, and his name should be stricken from the roll of members; that no notice was, at any time, given to him, that the treasurer had made any report, verbal or written, that he was in arrears for his dues, and no opportunity was ever given him to controvert or excuse the fact that he was in arrears; that at or before said meeting in April, 1884, no charge was made against him with respect to said dues other than said verbal report; and that he was not present at said first meeting in April. It is also averred that, at a meeting held on 26th April, 1884, the society elected John H. Blue a member of the Board of Censors for the relator's unexpired term; and, at a meeting held on 3rd May, 1884, the society adopted an ordinance, requiring and commanding said board to convene on 5th May, 1884, and to then and there admit and treat said Blue as a censor duly elected by the society in the relator's place and stead, and thereafter to treat and recognize said Blue as such censor. It is charged that all said proceedings were without authority and void; and that thereby relator is wrongfully denied the privileges of his membership in said society, etc. An excuse is given for the failure to pay his dues, which need not be here stated. The prayer of the petition is, that a rule be issued against said society, to show cause why a peremptory *mandamus* should not issue to compel said society to restore the relator to membership therein, and to rescind the ordinance requiring the Board of Censors to receive and admit said Blue as a member thereof, in the relator's stead, and to proceed no further under said ordinance.

A rule having been issued and served as prayed, the society appeared, craved oyer of its constitution, which is fully set out, and demurred to the petition and rule, assigning numerous grounds. The demurrer was overruled, and thereupon the



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society filed an answer, insisting that, by its constitution, a copy of which is exhibited, it was fully authorized and lawfully empowered to do each and every thing which is complained of, or alleged in the petition, and alleging that, at the time of the adoption of the constitution, the relator was a member of the society, and continued to be such member until the first regular meeting in April, 1884, which was held on the fifth day of that month, and was the regular meeting, according to the constitution, for the revision of the roll of members, when he lost his membership, and was duly stricken from the roll of members, on account of the non-payment of his dues, which became due and payable on 1st January, 1884; "and of all this the relator was duly notified by the secretary of said society, before the meeting which was held on April 12th, 1884." It is again and further averred in the answer, that the relator "was duly stricken from the roll of members of said society, at its first regular meeting in April, 1884, by the secretary of said society, on the revision of said roll at that meeting, and on the report of said treasurer, which he made by reading from the treasurer's book, in which the account of annual dues was kept by said treasurer, which report stated the fact to said society, that the annual contribution of six dollars which was due by said Weatherly to said society on 1st January, 1884, remained wholly unpaid; and that the treasurer had before, to-wit, on or about 1st of March, 1884, served upon said Weatherly a written notice, calling his attention to the requirements of article eight of said constitution, and to the penalty therein prescribed for delinquents; and that said report of said treasurer was true in point of fact;" that the minutes of said meeting of 5th April, 1884, including the roll of members as then revised, "were duly read at, and approved by the next regular meeting of said society thereafter, which was duly held on April 12th, 1884; and that at this last meeting, the roll as revised was duly called, and no objection made thereto." The petition then proceeds: "Except as otherwise shown in this answer, the statement contained in said alternative writ [the recitals of the averments of the petition] as to the manner in which said Weatherly was stricken from the roll of said society at the said first regular meeting in April, 1884, is here admitted to be substantially correct."

It is further averred that at "the regular meeting of said society, on April 12th, 1884," a resolution offered by a member, declaring, in substance, that the proceedings of the society at the first regular meeting in April, striking the relator's name from the roll of members, were null and void, was lost; and that "at the regular meeting of the society, on 26th April, 1884," an ordinance or resolution was adopted, ordaining and

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declaring, in substance, that the relator's name was properly stricken from the roll of members on 5th April, 1884, according to the constitution; and that his place on the Board of Censors was vacant, and that the society proceed to fill the vacancy by election. Dr. Blue was then elected, and the secretary instructed to notify the board of the election. On 3rd May, 1884, as is further averred in the answer, another regular meeting of the society was held, at which the society refused to receive the relator's dues, which were then tendered; and, having been officially informed that the Board of Censors refused to recognize Dr. Blue as a member of the board in the relator's stead, the society passed an ordinance or resolution, directing the board to hold a meeting at a stated time and place, and then and there to admit and treat said Blue as a censor of the society in the place and stead of the relator, who, it is again declared, had lost his membership and office. It is also insisted that the constitution provided for an appeal, in such case, to the State Medical Association; and it is averred that the relator had never made application to the society to be restored by it to his membership therein, nor to his office of censor; and that he had never appealed to the State Association "as to any of the aforesaid matters."

To the answer the relator demurred, assigning numerous grounds. The court sustained the demurrer, and, the respondent declining to plead over, granted the writ as prayed. The rulings on the demurrers above noted, and the final judgment are here assigned as error.

RICE & WILEY and W. S. THORINGTON, for appellant.

D. CLOPTON, W. L. BRAGG, TROY & TOMPKINS and GUNTER & BLAKEY, *contra*

SOMERVILLE, J.—This is an application for the writ of *mandamus* by the relator, Dr. J. S. Weatherly, a licensed and practicing physician, seeking to vacate certain proceedings of the Medical and Surgical Society of Montgomery County, a voluntary association incorporated under the laws of this State by whose corporate action he claims to have been irregularly, and illegally deprived of his membership in said society, and excluded from its privileges.

We can entertain no doubt of the jurisdiction of the courts of this State to interfere, in all proper cases, by *mandamus*, as an appropriate remedy for the wrongful disfranchisement or amotion of a corporator, and to restore him to the enjoyment of a franchise of which he has been illegally deprived. This right of supervision over bodies corporate is one of great antiquity

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in our law, and is regarded as derived from the visitatorial power, always impliedly reserved by the Sovereign or the State in granting corporate charters, and which is exercised through the courts of common law jurisdiction.—High on Extr. Rem. §§ 291, 293. The modern and better view is, that this right of judicial visitation is not confined to public corporations, but extends as well to those of a purely private nature. Nor is it limited to such as are organized strictly for business purposes, or pecuniary profit, but is made applicable also to corporations formed for eleemosynary, religious, scientific, or other like purposes.—Angell & Ames' Corp. § 704; *State v. Milwaukee Cham. Commerce*, 47 Wis. 670. The King, under our ancient law, was the legally constituted visitor of all corporations, whose franchises may have been granted to subjects by his grace and authority, a jurisdiction, which was exercised through the medium of the courts, and the chief function of which was "to render their charters, or constitutions, ordinances and by-laws of perfect obligation, and generally to maintain their peace and good government."—Angell & Ames' Corp. (11th Ed.) § 684; 2 Kent, Com. 300. The just reason is that a corporate franchise is property, incorporeal, it is true, but deemed none the less valuable in the eye of the law. Each individual member, as remarked by Sir William Blackstone, is said in such cases to be the owner of the franchise, and his privilege of membership, we may add on high authority, is, therefore, properly subject to the protection of the courts as valuable, although it may have no actual market value.—2 Black. Com. 37; *State v. The Georgia Medical Society*, 38 Ga. 608; Moses on Mandamus, p. 184; *Dartmouth College v. Woodward*, 4 Wheat. 518.

The purposes for which this jurisdiction is commonly exercised is left in no doubt by the authorities. In High, on Extraordinary Remedies, § 294, it is said to be now a well established rule, that "*mandamus* will lie to restore to his corporate rights a member of a corporation who has been improperly disfranchised or irregularly removed from his connection with the corporation. And while the court will not inquire into the *merits* of the decision of corporate authorities in expelling or removing a corporator in the regular course of proceedings, yet, if the amotion has been conducted without due authority, the courts will interfere by *mandamus* to compel the restoration of the member to his corporate franchise." The same rule is declared, in substance, in Angell & Ames on Corporations (11th Ed.), § 695, where it is said that this jurisdiction will be exercised for compelling corporations generally "to observe the ordinances of their constitution, and to respect the rights of those entitled to participate in their privileges." "If a cor-



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porator has been unjustly or irregularly removed or suspended from his office, or disfranchised, the court," it is added, "will grant *mandamus* to restore him."—*Id.* § 704. By a more recent writer, of respectable authority, the doctrine is stated as follows: "A *mandamus* will issue in all cases to compel a corporation, or any particular officer, to perform any plain duty required by law in favor of a member or other interested party, whether such duty is imposed either by statute, charter, custom or contract."—Woods' Field on Corp. § 462. In the light of these authorities, and the numberless adjudged cases upon which they are predicated, and by which they are fully sustained, we think the rule may be regarded as firmly established, that, in every case of the disfranchisement of a corporator, the courts will entertain jurisdiction to restore him by *mandamus*, where the cause or ground of disfranchisement is legally insufficient, or where the proceedings by which it has been attempted are irregular, according to, or as tested by the charter or by-laws of the corporation. But no inquiry will be made into the merits of what has been regularly done by due course of proceeding.—*Com. v. The German Society*, 15 Penn. St. 251. The aim of the courts, as said by Mr. Justice Sergeant, in *Commonwealth v. The Pike Beneficial Society*, 8 Watts & Serg. 247, is to preserve corporate tribunals "in the line of order, and to correct abuses"—High on Extr. Rem. §§ 294, 297-304; Woods' Field Corp. § 462; Angell & Ames' Corp. (11th Ed.) § 704. The earnestness with which this particular subject of contention has been urged at the bar, on argument, has induced us to discuss it with greater elaboration than we might otherwise have indulged.

We need scarcely add that the jurisdiction under discussion is one which should never be rashly asserted, but always with due caution, and with a just regard for the rights of a majority of the corporators of any organized body or society, which may have expressed its will as to any matter under consideration, within the lawful scope of its charter, constitution, or by-laws.

The points of contention raised by the pleadings in this cause may be reduced to two simple inquiries:

(1) Whether the relator has, under the constitution of the medical and surgical society, of which he claims to be a member, forfeited his membership, *ipso facto*, by a failure to promptly pay his annual dues to the treasurer, without regard to *corporate action* by the society, or *notice* of such action to the relator.

(2) Whether the action of the society in declaring such forfeiture, or disfranchisement, is *regular*, as being in substan-

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tial compliance with the constitution or organic laws adopted for the government of its proceedings.

The several articles of the society's constitution, which are pertinent to these inquiries are the following:

"Sec. IV, art. 8. Every member shall pay into the treasury an annual contribution of six dollars, which shall be due and payable on the first of January of each year; and if it be not paid by the first meeting in April of each year, the defaulter shall *forfeit his membership*, and his name shall be stricken from the roll of members; and of this he shall be duly notified by the secretary."

Article 35 imposes upon the treasurer the duty of serving, on or about the beginning of March of each year, a written notice upon every member whose annual dues remain unpaid, calling his attention to the requirements of the foregoing article as to delinquents.

Article 15, section v, declares that "the first regular meeting in April, of each year, shall be the regular meeting for the revision of the roll of members." At this meeting the treasurer is required to report "the names of all members whose dues for the year have not been paid," and all such names, it is added, "shall be immediately stricken from the roll," the treasurer being declared to be "personally responsible to the society for the dues of all defaulting members not so reported."

Article 36, section x, relating to the duties and office of treasurer, more fully prescribes the nature and purpose of this report, as follows:

"Article 36. He shall *report to the society*, at the annual meeting for the revision of the roll, *a written statement* of the names of members who are in arrears for the dues of the year, *so that they may be stricken from the roll*, and he shall himself be held personally responsible for the dues of all delinquents, whom he fails so to report; but this written statement shall not be spread upon the minutes."

Article 59 provides in detail for the order of business, at what is designated as "the regular meeting for the revision of the roll," specifying, among many others, "the treasurer's report of members in arrears," and "the revision of the roll by the secretary." Article 63 declares that any one of these orders of business may be "suspended at any time by *the vote* of the majority of the members present at any meeting."

There are no other articles of the society's constitution which, in our opinion, materially affect the question under consideration. Those clauses relating to offenses and punishments, constituting section XII, very clearly embrace only malfeasance in office, and certain acts of unprofessional conduct, upon conviction of which, after formal charge and regular

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trial, the accused is liable to be reprimanded, suspended or expelled, at the pleasure of the society.—Articles 47–49. They have no reference to the forfeiture of membership for failure to pay dues. We need not, therefore, consider them in the construction of the articles under immediate consideration.

It is not denied that the relator, Weatherly, was in default by reason of his failure to make punctual payment of his annual dues. It is true that for this he offers an excuse, but with the sufficiency of this we have nothing to do, the merit or demerit of it being a matter within the peculiar cognizance of the society. Our inquiry is confined to the mere legal construction of the foregoing provisions of the constitution imposed by this society upon itself for its own orderly government, and which must be taken as the law of the case, so far as they are violative of no rule of law or canon of reason. In this work of construction, however, there are certain cardinal rules of interpretation which must be constantly kept in mind. No principle, in the first place, is better settled, as a mere axiom of universal application, than that all penal laws and regulations must be strictly construed, especially when they are summary in their character, and operate to produce a forfeiture of valuable rights. “The general policy of the law,” moreover, as observed by a learned Justice, speaking for the New York Court of Appeals, in *The People v. The Medical Society of the County of Erie*, 32 N. Y. 187, “is opposed to sharp and summary judgment, where the party whose rights are in jeopardy has no opportunity to be heard in his own defense.” This has been properly urged by counsel as a controlling and pivotal principle in the decision of this cause. It is applicable to ordinances of sovereign conventions, constitutions of government, Federal and State, the statute laws of all civil polities, whether republican or monarchical, the ordinances of municipalities, and to the by-laws and regulations of voluntary societies, whether incorporated or unincorporated.

It may be admitted, as argued by appellant’s counsel, that the constitution of the medical society, now under discussion, is in the nature of a contract between its members, and that they are bound by its provisions by reason of express assent in assuming the obligations of membership. It is equally binding, also, upon the society, as such, in its corporate capacity.

*White v. Brownell*, 3 Abb. Pr. (N. Y.) 318, 327. So it may be admitted that it is competent for any member of such an association to bind himself by agreement to forfeit his membership upon a specified condition, and that such forfeiture may be made to take effect at a time fixed, without special or personal notice to the party in default.—*McDonald v. Ross-Lewin*, 29 Hun (N. Y.), 87. A principle somewhat analogous,



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but far from identical, is settled in the case of mutual insurance companies, where, with few exceptions, the failure of the assured to make punctual payment of any premium due upon a policy held by him, may, by contract, be made to operate *ipso facto* as a forfeiture of his entire interest and membership. *Wheeler v. The Conn. Mut. Life Ins. Co.*, 82 N. Y. 543; *Ala. Gold Life Ins. Co. v. Thomas*, 74 Ala. 578. It is an important qualification, however, that no court will ordinarily adopt such a construction, unless the intention to waive notice may be inferred from uniform custom in the peculiar business, or is clearly expressed by the most unambiguous and explicit language. The question resolves itself, at last, into one of mere construction.

We have examined the constitution of this society with great care, that we might construe its various provisions in the light of those principles which must obviously govern us in arriving at a just and proper conclusion. Our opinion is, that it was never intended by the framers of this instrument, that the failure of a member to pay his annual dues should *ipso facto* operate as a forfeiture of his membership, but rather as a ground of forfeiture, in the nature of a judgment *nisi*, to be made final by the vote of the society. It is very true that the several articles of the constitution above set forth, exclusive of article 59, might well be construed to have this operation, if they stood alone without more. They seem to declare very plainly that such defaulter shall forfeit his membership upon a proper report being made by the treasurer, at a designated time, when his name shall be stricken by the secretary from the roll of members, and that he shall be duly notified of this fact by the secretary.—Articles 8, 15 and 35.

But the constitution of this society is no exception to the rule, that all such instruments, including laws, ordinances and regulations of every kind, must be so construed as to gather the true resultant of intention from all of its various parts *in pari materia*. It is our opinion that article 59 was intended to devolve the consideration of this subject of forfeiture—operating as it does in the disfranchisement of members and the amotion of officers—upon the society as a body, in its corporate capacity. The treasurer, it must be observed, is required to officially report to the society “a written statement of the names of members who are in arrears for the dues of the year, so that they may be stricken from the roll.”—Art. 36, Sec. x. These dues are payable on the first of January of each year, and if not paid by the first of April following, the member is in default. The time for ascertaining and verifying such default is, in our judgment, fixed by the constitution. It must be at a time not prior to the first meeting in April of each

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year, which is designated as "the regular meeting for the revision of the roll of members."—Articles 15 and 36. There are not less than *ten* separate "*orders of business*" designated for especial attention at this meeting. The *fifth* in order is the "Treasurer's Report of Members in Arrears," and the *sixth* is the "Revision of the Roll by the Secretary." There are many of these orders of business which manifestly demand the action of the body of the society. This we must know from the commonest knowledge of the rules of parliamentary law, which are presumptively adopted for the orderly administration of business in every association, corporation or voluntary society. It is expressly declared in article 63 that the *suspension* of any of these orders must be by "the vote of the majority of the members present at any meeting." As the paramount purpose of this regular meeting is stated expressly to be for the *revision of the roll of members*, based on the treasurer's report of members in arrears, it would be remarkable that so important an order of business should be transacted by the perfunctory action of a clerical officer without the indorsing voice of the society. Especially does this seem reasonable, in view of the fact, that such order can not be suspended without corporate action, and in view of the constitutional declaration, made elsewhere, that no member, who "stands *charged* with unprofessional conduct, or with *unpaid dues*," shall have the privilege of resigning his membership.—Art. 9, Sec. iv. The law justly regards the substance of things and their legal effect—not mere shadows and similitudes. The necessary legal effect of revising a roll, by dropping a name from it, would, in this case, operate in the disfranchisement of a member, and the amotion of an officer. The rule of law is known to be, that this power resides generally in the body of every corporate society, that it is judicial in its nature, and must be exercised by a vote of the society expressing the corporate will, and ordinarily the records or minutes of the body must show that the requisite steps were taken in compliance with the charter and by-laws of the corporation, after reasonable notice to the party charged, either express or implied.—Woods' Field Corp. § 55; Ang. & Ames' Corp. § 420; High on Extr. Rem. § 295; *People v. Amer. Institute*, 44 How. Pr. (N. Y.) 468; *State v. Georgia Med. Society*, 38 Ga. 608; *The People v. Mechanics' Aid Society*, 22 Mich. 86; *People v. Medical Society*, 32 N. Y. 187; *State v. Milwaukee Cham. Com.*, 47 Wis. 670. We have been cited by appellee's counsel to several cases, somewhat analogous to the present one, in which the principles above stated have been adjudged applicable where the names of members have been stricken from the rolls of membership of various clubs and associations, for failure to punctually pay their dues in accordance with the

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provisions of their constitutions declaring membership forfeited for such reason.—*State v. Carteret Club*, 40 N. J. (Law) 295; *Com. v. German Society*, 15 Penn. St. 251; *Delacy v. Neuse River Nav. Co.*, 1 Hawks (N. C.), 274. In the case last cited it was said by the court: "It is a fundamental principle of our law, and recognized in every court of justice (and this corporation was a court when passing on the rights of its members), that no man can be condemned or prejudiced in his rights without an opportunity to be heard."

These principles can not be ignored in construing the various articles of the constitution before us. They are rules of law, of parliamentary usage, of justice and common sense, designed for the impartial protection of all alike. So much are they favored by the law that they must be implied in all cases of doubt. And that which is necessarily implied is as much a part of a constitution, a statute or a by-law, as that which is expressed.—*Ex parte The State of Alabama*, 71 Ala. 371; *Potter's Dwar. Stat.* 145. The revision of the roll of members must, in our judgment, be the act of the society itself, transacted, as any other order of corporate business, by the recorded vote of the body in its corporate capacity, showing the fact that the roll was revised by at least a majority of the members present and constituting a quorum, voting in the affirmative. The secretary of the society, who is the custodian of the roll and all other books, papers and records of the society, except those belonging to the office of treasurer (Art. 27), is the mere instrument and amanuensis of that body for the accomplishment of the end in view, for which the "regular meeting for the revision of the roll" was specially convened by the organic law itself. It is not impossible that the treasurer may make a mistake in designating the names of those liable to disfranchisement as defaulters. His memory may be at fault. He may have been guilty of the negligence of a clerical misprision. The fact of non-payment may be controverted, or the party in default may have some excuse, as to the merits of which he may desire to invoke the judgment of the society in waiver of his delinquency. These matters, we repeat, are subjects of investigation and determination by the corporation itself, whose exclusive privilege and prerogative it is to declare such forfeiture or disfranchisement.—*State v. Carteret Club*, 40 N. J. (Law) 295. The clerical work of revision is, in one sense, the act of the secretary, in as much as the duty of striking off names and the preparation of a revised list are devolved upon him. But the corporate act of revision, which is a legal ratification of the act of the secretary, is an order of business judicial in its character, and of great importance in its nature and results, and for these reasons, as



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we have said, must be transacted by the vote of the members in their corporate capacity. This conclusion is in perfect harmony with the settled analogies of law and rules of procedure governing corporate bodies, as we find them generally declared by the text writers, and enunciated by the courts in this country. It would require a clear case, free from all doubt, to induce us to depart from these respectable precedents.

We proceed next in order to consider the questions raised as to the regularity of corporate procedure. We are of opinion that, under the provisions of article 36 of the society's constitution, the official report, required to be made by the treasurer, of all members who are delinquent in the payment of dues, is required to be made in writing, as a necessary basis for the action of the society. The language of the article is, that he "shall report to the society, at the annual meeting for the revision of the roll, a *written statement* of the names of members who are in arrears for the dues of the year, *so that* they may be stricken from the roll." We have said that this provision was penal, and must be strictly construed. It scarcely needs a strict construction, however, to authorize the conclusion, that such statement should not only be in writing, but in the form of an official report, authenticated by the signature of the treasurer. Such a report involves the statement of a fact in the nature of a charge, which is sufficiently serious in nature to debar the delinquent of the privilege of resigning, and subjects him, if true, to the loss of valuable rights—to disfranchisement as a member, and consequent amotion as an officer. There is, therefore, an idea of grave responsibility attached to such a report, which alone constitutes a sufficient reason for requiring it to be in writing—a form conveying also a suggestion of probable deliberation and verity. The fact that this statement is not permitted to be spread upon the minutes, is a strong reason why it should be in writing, as the only means of preserving a record or memorial of an important charge, upon which, as we have decided, a vote of the society is required to be taken. We are not permitted to say that a verbal report, without minutes or record, will answer, when the constitution requires a report in writing. The case of *The People v. American Institute*, 44 How. Prac. 468, cited by us *supra*, furnishes a striking illustration of how far a respectable court has carried this principle. The defendant corporation was there shown to have adopted Cushing's Manual as its rules of parliamentary government. A member being expelled for using improper language at a meeting of the society, the court, upon his application by *mandamus*, restored him upon the ground of the irregularity of the corporate proceedings by which it was sought to disfranchise him. This defect consisted in the fact that the words used were not *reduced*

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*to writing*, and acted upon at the meeting at which they were spoken.

Applying these principles to the present case, the facts show that there was no written statement or report made by the treasurer of the society at the regular annual meeting held in April for the revision of the roll, or at any subsequent meeting. The mere reading of the name of the relator from a book, without more, very clearly was not such a written statement within the meaning of article 36 of the constitution.

It is also made to appear that there was no vote of the society taken on this subject, as required, in our opinion, by the 59th article, to the provisions of which we have above adverted. As to this fact there is no controversy. But it is insisted that the subsequent action of the society, taken on the 26th of April, and on the 3d of May following, was sufficient, at which the forfeiture of the relator's membership was expressly declared by a majority of a quorum of members present and voting. These proceedings were, in our opinion, irregular for reasons most obvious.

The rule is settled, that all members of a body corporate are presumed to know of the times appointed by the charter or by-laws for the transaction of particular business; and, therefore, no special notice is required to be given of such meeting, or of the intention to transact such business.—Dillon's Mun. Corp. §§ 200–1; Woods' Field Corp. § 201, p. 314. So it is equally well settled, that any corporate body, whether municipal or private, can transact any business at an adjourned meeting, which could have been done at the original meeting, the former being but a continuation of the latter.—Woods' Field Corp. § 203; *Warren v. Mower*, 11 Vt. 385.

It does not appear, however, that any action was taken on the subject of contention at the regular meeting fixed by the constitution for its consideration, nor was the matter adjourned to another day. If either course had been taken, the relator would, no doubt, be charged with implied or constructive notice of the proceeding, even though he were not personally present. It is no doubt to a case like this that article 8 of the constitution is especially applicable, so far as it provides, that when a member's name is stricken from the roll, he shall be notified of the fact by the secretary. It is not contended that the relator, Weatherly, had any personal notice of the proceedings of the society taken on April 26th, or on May 3d, which sought to effect his disfranchisement and amotion. Nor was he chargeable, as we have seen, with implied notice. These proceedings were, therefore, irregular for want of notice under the principle which we have already announced, supported, as we believe it is, by both reason and authority. They are not, then, bind-

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ing upon the relator, and must be vacated on the ground of their irregularity.

We are not to be considered as deciding any principle which can be construed as denying to the Medical and Surgical Society of Montgomery County the full authority to deal with the relator, or any of its other members, in its own way and according to its own discretion, after due notice and by due course of regular procedure; provided only that their corporate action violates no established rule of law, and is in conformity to the constitution and laws of the society established for its own government. Nor do we intimate any opinion that the power of the society to take action in this matter ceased, because it was not put into exercise at the regular meeting fixed for the revision of the roll. As to this point we decide nothing. Our decision goes no further than to vacate proceedings deemed to be irregular. It does not affect the right to take other proceedings which may be regular, under the principles which we have above announced.

The judgment of the city court is construed by us to be in full accordance with these views; and it must, therefore, be affirmed, so far as it affects the rights of the relator, Weatherly.

BRICKELL, C. J., dissenting.

## Jeffries v. Castleman.

*Action by Married Woman for Money had and received, belonging to her Statutory Separate Estate.*

1. *Decisions reaffirmed.*—The principles declared in *Castleman v. Jeffries*, 60 Ala. 380, and in *Jeffries v. Castleman*, 68 Ala. 432, adhered to and reaffirmed.

2. *Replication of statute of limitations to plea of set-off; when demurrable.*—The statute of limitations can not defeat a plea of set-off, unless the bar was complete when the plaintiff's cause of action accrued (Code, 1876, § 2996); and a replication setting up the statute is bad on demurrer, when it appears from the complaint and plea, that the bar was not complete when the plaintiff's cause of action accrued.

3. *Admissions of one partner after dissolution against the other; when incompetent.*—The admissions of one partner, made after a dissolution of the partnership, and after he had transferred his interest to his copartner, are not admissible in evidence against the latter, in a suit between him and a debtor of the partnership.

4. *Testimony of a deceased witness on former trial; when may be proved.* The testimony of a deceased witness on a former trial, when he was subjected to cross-examination, is admissible on a subsequent trial, and may be proved by any competent witness.



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APPEAL from Hale Circuit Court.

Tried before Hon. JOHN MOORE.

This was an action brought by Mrs. Ann M. Jeffries, wife of Walter B. Jeffries, against D. J. Castleman, to recover a stated amount alleged to have been due by account for money had and received, on 18th November, 1872, by Jeffries & Castleman, a partnership composed of A. S. Jeffries and the defendant, which belonged to the *corpus* of the plaintiff's statutory separate estate; and was commenced on 8th February, 1875. The defendant pleaded the general issue, payment, and set-off, the set-off consisting of an account contracted by the plaintiff's husband with the said firm of Jeffries & Castleman, "during the years 1870-1-2-3, and due and payable on, to-wit, the 1st day of January next," for goods, wares and merchandise alleged to have been "articles of comfort and support of the household, suitable to the degree and condition in life of the family of the said Walter B. Jeffries and Ann M. Jeffries, and for which the said Walter B. Jeffries would be liable *in invitum* at common law," and for which the plaintiff's statutory separate estate was liable under the statute. A demurrer interposed by the plaintiff to the plea of set-off having been overruled, the plaintiff replied, (1) that the account sought to be set off against the plaintiff's demand was an open account, and was barred by the statute of limitations of three years; and (2) that said account had been fully paid before the commencement of the suit. To the replication setting up the statute of limitations the defendant demurred, and his demurrer was sustained. The trial resulted in a verdict and judgment for the defendant. The reports of this cause on former appeals contain a full statement of the case made by the record touching the questions then decided. See *Castleman v. Jeffries*, 60 Ala. 380, and *Jeffries v. Castleman*, 68 Ala. 432. The other facts necessary to an understanding of the points decided are sufficiently stated in the opinion.

THOS. R. ROULHAC, for appellant.

WEBB & TUTWILER, *contra*.

SOMERVILLE, J.—The general charge of the court is in full accord with the principles heretofore settled in this case, when formerly before us on appeal. We are not willing to depart from the doctrines declared in *Castleman v. Jeffries*, 60 Ala. 380, and *Jeffries v. Castleman*, 68 Ala. 432. The rulings in these cases are based upon the solid ground, that the present code of statutes, known as "married women's laws," must be construed, as far as practicable, to be a *shield* for the protec-

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tion of *femmes covert*, and not a *sword* with which to arm them for the injury of others.

There was no error in the ruling of the court, sustaining the *demurrer* interposed by the defendant to the plaintiff's replication of the statute of limitations. The present Code expressly provides that "when a defendant pleads a *set-off* to the plaintiff's demand, to which the plaintiff replies the statute of limitations, the defendant, notwithstanding such replication, is entitled to have the benefit of his debt, as a set-off, where such set-off was a legal subsisting claim *at the time the right of action accrued to the plaintiff on the claim in suit.*"—Code, 1876, § 2996. It appears from the complaint in the cause, that the plaintiff's right of action accrued, if at all, on the 18th day of November, 1872, and the facts averred in the plea of set-off show that the accounts claimed by defendant were not then barred by the statute of limitations, and were therefore legal and subsisting claims, within the meaning of the above section of the Code, at the time plaintiff's right of action accrued. These facts being apparent on the face of the pleadings, the point was properly presented by *demurrer*. The effect of the statute, in this particular class of cases, is to render the statute of limitations entirely unavailing as a defense to the set-off. *Washington v. Timberlake*, 74 Ala. 259; *Riley v. Stallworth*, 56 Ala. 486.

If it be conceded that the *admissions*, sought to be proved as having been made by A. S. Jeffries, were competent to prove payment of the set-off, it does not appear that they were made prior to the dissolution of the partnership of Jeffries & Castleman, which is shown to have taken place in May, 1873, when the accounts in question were transferred by Jeffries to Castleman. If made after such dissolution, and *after the transfer of Jeffries' interest* in the subject of the set-off, the latter's admissions as to the fact of payment would very clearly be inadmissible against the other partner, Castleman. To be receivable in evidence, such admissions must be shown affirmatively to have emanated from a person having at the time some interest in the subject-matter to which they have reference.—1 Greenl. Ev. §§ 179-180.

The witness Melton, having testified under oath on a former trial, when he was subject to cross-examination, and having since that time *deceased*, it was permissible to prove by any competent witness the testimony then given, and it becomes admissible evidence upon the second trial.—1 Greenl. Ev. § 163; 2 Best Ev. § 496; Whart. Ev. § 177; *Marler v. State*, 67 Ala. 55.

We discover no error in the rulings of the circuit court, and the judgment must be accordingly affirmed.

[Fox v. Storrs.]

**Fox v. Storrs.***Statutory Real Action in the Nature of Ejectment.*

1. *Powers or trusts ; duration of.*—The general rule is, that powers or trusts can not continue beyond the period required by the purposes for which they were created.

2. *Same ; will construed.*—A testator devised and bequeathed to his widow the legal title to all his estate, impressed with an express trust for the support, maintenance and education of his children, and coupled with the power to manage and control his property during her life or widowhood, or until there should be a distribution under the provisions of the will; and further provided for the allotment to each child, on marrying or attaining majority, of his or her share of the estate, the family relation continuing as to the others, and for an absolute division and distribution on the second marriage of the widow. *Held*, that a general, discretionary power conferred on the widow by the will to sell all or any part of the testator's estate, not limited to any particular purpose or period of time, terminated on her second marriage, and was incapable of exercise by her thereafter.

APPEAL from Shelby Circuit Court.

Tried before Hon. S. H. SPROTT.

This was a statutory real action in the nature of ejectment, brought by John S. Storrs and three others against Herman Fox, and was commenced on 3rd September, 1881. The cause was tried on issue joined on the plea of not guilty, the trial resulting in a verdict and judgment in favor of the plaintiffs for "four-fifths" of the premises sued for.

As shown by the evidence, John S. Storrs departed this life in 1862, seized and possessed of the land in controversy, and leaving him surviving the plaintiffs, his only children, and Martha S. Storrs, his widow. He also left a last will and testament, which was duly admitted to probate in the probate court of Shelby county, in this State, in August, 1863, when the widow, she having been nominated in the will, was appointed executrix. The will was read in evidence, and its provisions are, for the purpose of this report, sufficiently stated in the opinion. The said Martha S. Storrs intermarried with one Holbrook prior to the year 1871; and afterwards, on 20th September, 1871, she sold and conveyed the premises sued for to Pleasant H. and Charles B. West, the said Holbrook joining with her in the execution of the deed. The defendant was in possession of said premises, at the time this suit was commenced, "as a tenant of Mrs. M. J. Houston, who holds the same



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by regular conveyance through the said Wests." The rental value of the property was also shown. This being the substance of all the evidence introduced on the trial, the court charged the jury, at the written request of the plaintiffs, that if they believed the evidence, they should find "for the plaintiffs for four-fifths of the premises, and for four-fifths of the amount of the rental value thereof from one year before the commencement of suit to the day of trial." To this charge the defendant excepted, and also to the refusal of the court to charge, at his written request, that if they believed the evidence, they should find for him.

The charge given, and the refusal to charge as requested, are here assigned as error.

COBB, WILSON & WILSON, for appellants.

TROY & TOMPKINS, *contra*.

BRICKELL, C. J.—It is plain, and has not been controverted, that by the will of the testator, John S. Storrs, there is conferred upon his widow a general, discretionary power to sell all or any part of his estate. The primary question is, whether this power was continuing, or whether it had expired at the time of the sale and conveyance under which the defendant deduced title to the premises in controversy. The purposes for which the power was to be executed are not specially appointed in the will; neither the payment of the debts of the testator, nor the support of his wife and children, nor the education of his children, nor effecting a division between the wife and children, nor the conversion of property from one species to another, is designated as a purpose, to accomplish which the power may be exercised. The power is general, a matter of personal confidence in the donee, and to her discretion solely its exercise is committed, and the policy or expediency of its exercise she was to determine in view of the interests of the beneficiaries to whom the estate is ultimately devised and bequeathed.

The legal title to all the estate of the testator is devised and bequeathed to the widow, coupled with the power to manage and control it during her life or widowhood, or until the period appointed for division and distribution. Upon the legal estate is impressed an express trust for the support, maintenance and education of the children of the testator, enduring until there is a division and distribution. The manifest purpose of the testator was the continuance after his death of his family relations unbroken and undisturbed, the wife and mother having the control, while she remained unmarried. When either of his children arrived at full age, or married with the

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consent of the mother, if such child desired, a division and distribution were to be made, allotting to him or her a share of the estate, corresponding to the share which the statute of descents and distributions would have given in cases of intestacy; the residue of the estate remaining in the possession, and under the control of the mother, in whom the legal title resided. But upon the marriage of the mother, whenever it occurred, whether during or after the minority of the children, or before or after the marriage of a child, the estate was to be divided and distributed; each child, not having previously drawn a share, taking one-fifth absolutely, and the mother one-fifth during her life, remainder to the children. A will of this general scope and character is not unusual. The controlling purpose is, that during the minority of the children, and the widowhood of the mother, the family relations of the testator may remain undisturbed, and to his place, as the head and governor of the family, the wife and mother may succeed. They spring from affection for the wife, and unlimited trust and confidence that while in widowhood, left only to her own judgment, and a consideration of the interests of herself and children, the powers with which she is invested will be justly and prudently exercised. But while to her, the trust and confidence is extended, and large discretionary powers are committed, as it can not be anticipated when she may marry, the testator is naturally unwilling that the powers should be exercised after her marriage, when her judgment and discretion may be controlled by a stranger to him, and an alien to his children.

The general rule is, that powers or trusts can not continue beyond the period required by the purposes for which they are created.—4 Kent, 233; Perry on Trusts, § 312. The power of sale with which the widow was invested is but one of the trusts resting in personal confidence, created by the will. It is the largest and most exclusively discretionary powers with which she is clothed; a power it can not be presumed it was contemplated she should exercise after the termination of her legal estate, and after the period appointed for division and distribution, when she had formed a new relation, in which necessarily her discretion and judgment were in a greater or less degree subordinated to that of another, who was unknown to the testator, and to whom he did not extend confidence and trust. The exercise of the power after marriage would not be consistent with the division and distribution of the estate, which the will expressly appointed at the period of the marriage of the widow, and would enable her then to defeat and disappoint the legal estate with which the children, in that event, were invested as tenants in common with her. The sale and conveyance after her marriage was unauthorized; the power of sale

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given by the will had expired; it was a continuing power only during the continuance of the legal estate of the widow, and was incapable of exercise after the termination of that estate. 2 Perry on Trusts, § 498.

The result is, the circuit court did not err in the instruction given the jury, and the judgment must be affirmed.

## Moody, Adm'r, v. Hemphill.

### *Final Settlement of Decedent's Estate in Probate Court.*

1. *Settlement of decedent's estate; when decree for wife's interest must be in favor of husband and wife.*—A testator, dying in 1840, devised lands to his wife for life, with remainder to designated children, one of whom was a daughter who married in 1846. The widow died in 1874, and, after her death, the lands were sold under the will by the personal representative. *Held*, on final settlement.

(a) That the daughter's interest in the devised lands accrued on the death of the testator, but her right of enjoyment did not arise until the death of the widow.

(b) That while the husband's marital rights attached on his marriage, the ownership of the fund resulting from the sale did not vest in him, he not having reduced it to possession.

(c) That a decree on final settlement for the daughter's distributive interest in the fund should be in the name of herself and husband, and not in her name alone.

### APPEAL from Tuscaloosa Probate Court.

Tried before Hon. N. H. BROWNE.

In the matter of the final settlement of the accounts of Frank S. Moody, as the administrator *de bonis non*, with the will annexed of Edward Sims, who departed this life in 1840, leaving a widow and several children. The testator devised lands, with other property, to the widow for life, with remainder to his children, one of whom is Mrs. Mary J. Hemphill, who intermarried with F. F. Hemphill in 1846. It seems that this land was sold after the death of the widow under the will, and from the proceeds of the sale the administrator paid, in 1874, among other things, a legacy of \$2000, left to one Aaron Ready. The final settlement of the appellant's accounts as such administrator, was first had in 1877, when he was allowed credit for the amount paid on account of said legacy. This item was, however, contested, and was reviewed in this court on appeal, when the decree of the probate court was reversed, and the cause remanded. See *Hemphill v. Moody, Adm'r*, 62 Ala. 510. After the settlement in the probate court in 1877,



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the administrator made distribution, thus leaving no other debit against him than the said item of \$2000, and interest.

On the settlement a decree was entered in the name of Mrs. Hemphill alone for her distributive share; and that is, *inter alia*, here assigned as error.

J. M. MARTIN, for appellant.

A. C. HARGROVE, *contra*.

STONE, J.—Mrs. Hemphill's right to the distributive interest claimed in this suit accrued in 1840, but her right to its enjoyment did not arise until the death of her mother in 1874. She intermarried with her present husband in 1846, before the enactment of the first woman's law, in 1848. Hence, the present proceeding is not at all affected by our statutes securing to married women their separate estates.

When this case was before us at a former term—64 Ala. 468—we stated the reasons why the possession of Mrs. Sims, the life-tenant, could not be regarded as the possession of those in reversion or remainder. It follows from what was there said that, although Mr. Hemphill's marital rights had attached on his marriage, the ownership in the fund had not vested in him, because he had never reduced it to possession, actual or constructive. It remained a chose in action, to be reduced to possession by voluntary surrender, or by suit, as any other chose in action, owned by the wife at the time of the marriage, was regarded and held at the common law. For the reduction of such claim to possession by process of law, the suit and recovery must needs be in the joint names of husband and wife. *Blackwell v. Vastbinder*, 6 Ala. 218; *Sankey v. Elsberry*, 10 Ala. 455; *Pickens v. Oliver*, 29 Ala. 528; *Thrasher v. Ingram*, 32 Ala. 645. It follows that the probate court erred in rendering the decree in favor of Mrs. Hemphill alone.

All the other questions urged upon our consideration have been ruled adversely to the appellant, and, we think, rightly so ruled. We have no disposition to overturn any thing heretofore declared.—*Hemphill v. Moody*, 62 Ala. 510; s. c. 64 Ala. 468; *Moody v. Hemphill*, 71 Ala. 169.

The decree of the probate court of September 12th, 1882, so far as the same decrees in favor of Mary J. Hemphill, is reversed at her costs, and, proceeding to render the decree the probate court should have rendered, it is ordered and decreed that the said Frank S. Moody pay to F. F. Hemphill and Mary J. Hemphill, his wife, the sum of five hundred and sixty-three dollars and ninety cents, for which execution may issue from the probate court; this decree to take effect and bear date as of

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September 12, 1882. The costs of this appeal, both in the probate court and this court, to be paid out of the sum thus to be collected.

In all other respects, including the decree in favor of John S. Jemison, administrator, the decree of the probate court is affirmed; the decree to be executed by the probate court.

Reversed to the extent above shown, and here rendered.

SOMERVILLE, J., not sitting.

## Singer Manufacturing Company v. Sayre.

### *Action for Breach of Covenant in Lease.*

1. *Tenant holding over after expiration of term, effect of; statute of frauds.* When a tenant for years holds over after the expiration of his term, the law, in the absence of evidence to the contrary, will imply an agreement to continue the lease for another year upon the same terms and conditions; but such implication is destroyed, if a new contract, essentially different in its terms and conditions, is made, and the inference is fair that it was intended to displace the old one, although it is void under the statute of frauds.

2. *Same; effect of payment of rent.*—If, however, the tenant continues to hold during the year, and pays his rent, which is materially reduced by the new contract, the payment and acceptance of the rent operate a full recognition of the relations of landlord and tenant as it formerly existed, and subject the tenant to all the covenants contained in the original lease, so far as they are applicable to the new order or condition of things.

APPEAL from the City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

This was an action brought in July, 1882, by Calvin L. Sayre against the Singer Manufacturing company, a body corporate, to recover damages for the alleged breach of a covenant contained in the lease of a certain store-house in the city of Montgomery, belonging to the plaintiff, and by him rented to the defendant. From the complaint as amended, it appears that on 15th April, 1874, a written contract for the lease of said premises was entered into by and between the plaintiff and the defendant, for a term ending on 30th day of September, 1877. In this lease was contained a covenant by the defendant as to the use of the premises, which is alleged to have been broken. The complaint sets out the covenant and its breach at length, but a fuller statement thereof is not necessary

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to a proper understanding of the opinion. It is also averred "that at the expiration of said term, said defendant continued in the use and occupation of said leased premises from year to year to the 30th day of September, 1879, under the same lease hereinbefore set out, except that, by agreement between said plaintiff and the said defendant, the amount of rent to be paid was reduced from seventy-five to fifty dollars per month, said contract of lease being to that extent, and to that extent only, modified and altered." The defendant pleaded (1) the general issue; (2) the statute of frauds; and (3) the statute of limitations; and upon issues joined on these pleas the cause was tried, the trial resulting in a verdict and judgment for the plaintiff.

The facts disclosed by the evidence, necessary to an understanding of the points decided, are sufficiently stated in the opinion. Exceptions were reserved by the defendant to the admission in evidence, against its objection, of the parol arguments as to the rent of the store, referred to in the opinion; and also to the refusal of the court to give the following, among other, charges requested by it in writing: (1) "That the averments in the complaint of the making of the written lease, and of its terms and covenants, are but matters of inducement to aver and show the terms and covenants of the subsequent leases averred in the complaint; and if the subsequent leases are void, then the plaintiff can not recover." (2) "If the jury believe from the evidence, that plaintiff and defendant, in April, 1874, entered into a written agreement, by which plaintiff leased said store of defendant for a term, commencing on April 15th, 1874, and ending on September 30th, 1877, with covenants as testified to by the witness Adams [a witness examined to prove the contents of the lease, it having been shown to have been lost or destroyed], and defendant agreed to pay plaintiff the sum of thirty-five dollars per month until October 1st, 1874, and seventy-five dollars per month thereafter to the end of said lease; that defendant occupied said store during said term; that prior to September 30th, 1877, plaintiff and defendant made a verbal agreement for the rent of said store for one year, commencing on October 1st, 1877, and ending on September 30th, 1878, and the defendant verbally agreed to rent said store under the same terms as contained in said former written lease, except that defendant agreed to pay only fifty dollars per month for the rent of said store, for which defendant executed twelve notes for fifty dollars each, payable monthly; that defendant occupied said store for the time specified in said verbal agreement; and prior to September 30th, 1878, the defendant executed its notes for the sum of fifty dollars each, payable monthly to plaintiff for the rent



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of said store for one year commencing on October 1st, 1878, and ending on September 30th, 1879; and that there was no written instrument signed by the parties, or either of them, other than said notes; then the plaintiff can not maintain this action, and is not entitled to recover in this suit."

The rulings above noted are here assigned as error.

J. M. FALKNER, with whom were CLOPTON, HERBERT & CHAMBERS, for appellant. (1) The contracts which are the foundation of this suit are within the influence of the statute of frauds (Code, 1876, § 2121, sub-div. 1), and, are therefore, void. They were by parol; and they were different, materially different from the written contract. Being different, no presumption can arise that the appellant held the premises under the written lease; and this being a suit for the breach of covenants in void contracts, there can be no recovery.—*Crommelin v. Thiess*, 31 Ala. 412; *Browne on Statute of Frauds*, §§ 283-5; *Delano v. Montague*, 4 Cush. 42; *Little v. Martin*, 3 Wend. 219.

H. C. TOMPKINS and RICE & WILEY, *contra*.—(1) It was competent for plaintiff to prove that defendant occupied the premises until September 30th, 1879; and if he had proved that and nothing more, the presumption would have been that its holding was as a tenant from year to year; and during that holding it would certainly have been bound by all the covenants of the original lease. That is well settled law. Therefore, to prove that there was some change in the terms of the holding, was really a benefit to defendant.—*Taylor's Land. & Ten.* § 58; *Id.* § 525, and authorities cited; *Webber v. Shearman*, 3 Hill, 547; *Thomson v. Amey* (opinion by WILLIAMS, J.), 12 Ad. & E. 476; *Dorrill v. Stephens*, 4 McCord, 59; 35 Penn. St. 45; *Finney v. City of St. Louis*, 39 Mo. 177; *Wolffe v. Wolff & Bro.*, 69 Ala. 549. (2) The charges requested assert the proposition, that, if one holding under a written lease continues, after the expiration of the term, to hold over for more than a year under a verbal agreement that he shall continue upon the same terms as were contained in the written lease, except a change in the amount of rent to be paid, he is not only under no legal obligation to comply with these terms, but is released from all damages accruing to the lessor for breaches of the covenants of the written lease. It is insisted that not only is this not the law, but, on the contrary, such an agreement as the one shown is a valid agreement, and the covenants in the original lease are binding during the holding over. If defendant was holding under a void contract, it was not holding under any contract whatever; but if it held

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over and paid rent, as soon as the rent was paid and accepted, then its holding over became that of a tenant from year to year; and it was bound, during the holding, by all the covenants contained in the lease under which it entered.—Taylor on Land. & Ten. § 58; *Ib.* 525; *Crommelin v. Thiess*, 31 Ala. p. 419; 1 Chitty's Con. pp. 450–1. (3) The agreement is not void, because defendant occupied the leased premises during the whole term stipulated for, and paid the rent agreed upon. There are two classes of contracts for the sale of land, or interests therein, for more than a year, which the statute does not render void, and which, therefore, could be enforced in a court of law; and in this our statute differs from that of 29 Car. 2, and from those of most of the States. These two classes are (a) contracts in writing, signed by the parties, or their legally authorized agents; and (b) contracts where the purchaser is let into possession, and pays the purchase-money, or a portion of it. Each of these contracts is valid at law. The statute of 29 Car. 2, required all such contracts to be in writing. Courts of equity stepped in, and decreed the specific performance of parol contracts, where there had been such performance as would make the harsh rule of law operate unjustly. That was an equitable right; but our statute places parol contracts, where certain things are done in connection with them, on an equal footing with, and makes them of the same dignity as, written contracts. That is, it makes them not only capable of enforcement in equity, but also at law.—Code of 1876, § 2121, subd. 5; authorities *supra*. (4) But the holding over with a parol agreement, void under the statute of frauds, changing the amount of the rent, but providing that the holding is to be under the other terms of the original lease, is binding upon the lessee, if he has had the quiet possession of the premises during the additional term, and has paid, and the lessor has accepted rent; and he is liable to the lessor upon the covenants of that lease for any breaches committed during such additional holding.—Taylor's Land. & Ten. §§ 58, 362–3; *Ib.* § 525, and authorities cited; 1 Chitty's Con., pp. 450–1; *Richardson v. Gifford*, 1 Ad. & Ell. 52; *Beale v. Sanders*, 3 Bing. (N. S.) 850; *Digby v. Atkinson*, 4 Camp. 275; *Brudnell v. Roberts*, 2 Wilson, 143; *Brown v. Bellows*, 4 Pick. 179; *Thomason v. Dill*, 30 Ala. 444.

SOMERVILLE, J.—The right of the plaintiff to maintain the present action is admitted to turn on the question as to whether or not the contract of tenancy is void under the influence of the statute of frauds, as “an agreement which, by its terms, is not to be performed within one year from the making thereof.”—Code, 1876, § 2121, subd. 1.

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The evidence shows that the defendant corporation, the Singer Manufacturing Co., held the premises occupied by it under a written lease from April 15th, 1874, until September 30th, 1877, paying the plaintiff therefor a stipulated monthly rent. Prior to the termination of this lease, a verbal agreement was made between the parties by which the rent was reduced from seventy-five to fifty dollars per month, and providing that the defendant should rent for another year under the terms of the old lease. The defendant executed its several promissory notes for the rent, all of which were paid in due time. Prior to the expiration of the latter term, a similar agreement was entered into for another lease to extend from October 1, 1878, for the period of one year—the defendant, as before, executing its promissory notes, payable monthly, and making payment of them to the plaintiff as landlord.

The principle is generally settled, and has been many times announced by this court, that where a tenant for years holds over after the expiration of his term, the law, in the absence of evidence to the contrary, will imply an agreement to hold, or continue the new lease for another year, upon the terms and conditions of the old or prior one.—*Wolffe v. Wolff & Bro.*, 69 Ala. 549; *Crommelin v. Thiess & Co.*, 31 Ala. 412.

This principle would be conclusive of the present case, but for the verbal agreements by which a change was effected in the amount of rent stipulated to be paid for the two last years of the defendant's occupancy of the plaintiff's premises. The argument is, that the new contract, although void under the statute of frauds, destroys the implication of the renewal of the original lease, which the law ordinarily raises from an unexplained holding over by the tenant. This is no doubt the rule, where the new contract is essentially different from the old one in its terms and conditions, and the inference is fair that the former is intended to displace the latter.—*Horton v. Wollner*, 71 Ala. 452; *Crommelin v. Thiess & Co.*, *supra*.

But there is another rule operating in this case, which entirely excludes it from the influence of the last mentioned principle. If we admit that the defendant held under a void agreement, by which no title of tenancy became vested, being thus regarded as a tenant at will, or by sufferance, after the expiration of the written lease, this relationship between the parties was changed by the payment and acceptance of rent, which is shown to have taken place during the last two years. This was an act in full recognition of the relation of landlord and tenant as it formerly existed, and operated to establish a new tenancy from year to year by vesting *eo instanti* a term in the defendant as a yearly tenant.—*Crommelin v. Thiess & Co.*, 31



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Ala. 412, 419, *supra*; Taylor's Land. & Ten. § 56, and cases cited in NOTE 2; 2 Greenl. Ev. § 306.

In all such cases, where the tenant has been permitted to hold over after the expiration of a prior tenancy, his payment of rent will be referred to the original demise, subject to all the covenants contained in the original lease, so far as they are applicable to the new order or condition of things.—Taylor's Land. & Ten. §§ 58, 362. Promises of this character are implied by *law* from the acts of the parties, rather than from any supposed special agreement between them. They do not, therefore, come within the evil of the statute of frauds, and are commonly adjudged to be excepted from its operation.—Verbal Agreements (Throop), §§ 95–102.

There are probably other grounds upon which we can justify the conclusion which we have reached, that the contract of tenancy between the plaintiff and defendant is not repugnant to any provision of the statute of frauds, but these we need not consider.—*Crawford v. Jones*, 54 Ala. 459.

The rulings of the circuit court are free from error, and its judgment is affirmed.

## **East and West Railroad Company of Alabama et al. v. East Tennessee, Virginia & Georgia Railroad Company.**

*Bill in Equity to enjoin Railroad Company from Constructing its Railroad on the Right of Way of another Railroad Company.*

1. *Grant of injunction by officer without authority; remedy for correction of error.*—When an injunction is granted by a judicial officer who has no authority to grant it, the error or irregularity is only available upon motion for a discharge of the injunction, which must precede any act on the part of the defendant in recognition or affirmance of its regularity. In such case, a motion to dissolve is not the appropriate remedy, but is a waiver of the error or irregularity.

2. *City Court of Selma; authority to issue remedial writs.*—The City Court of Selma, being, by the express terms of the statute creating it, clothed with "the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs," has, under the well defined legislative policy of this State, intended to expedite the administration of justice, the authority to issue, or order the issue of such writs, returnable into any court of the State having jurisdiction of them.

3. *Motion to dissolve injunction for want of equity; what inquiries opened by.*—A motion to dissolve an injunction for want of equity in the bill can not perform the office of a demurrer to the bill; but, on the hear-

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ing of such motion, all amendable defects should be regarded, *pro hac vice*, as cured by amendment, and the inquiry made, whether, if the facts were well pleaded, the case would be of equitable jurisdiction, and an injunction the appropriate remedy.

4. *Corporations invested with right of eminent domain; jurisdiction to enjoin from appropriating land without making compensation.*—The principle upon which a court of equity proceeds in interfering to prevent bodies corporate having compulsory power to enter upon, and to take and appropriate for their own uses, the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, nuisances, or trespasses, when only private rights, or the rights of persons, natural or artificial, not having such powers, are involved; the court intervening, in such cases, because of the necessity to keep such corporations within control and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable.

5. *Same; when bill contains equity.*—Hence, averments in a bill filed by one railroad corporation against another, to enjoin the defendant from constructing its railroad on the complainant's right of way, that the defendant has wrongfully taken possession of lands of which the complainant was possessed, and is appropriating the same to its uses, that it had not proceeded to the condemnation of the lands in the mode prescribed by law, and had not, in obedience to the Constitution, made just compensation therefor, give the court jurisdiction to prevent the further invasion of the property by the defendant, without regard to any question of irreparable injury.

6. *Same; when court will not interfere.*—If, however, in such case, the right and title of the complainant are not clear, or if the whole controversy resolves itself into a naked dispute as to the strength of the legal title, and it is not shown that an action of trespass or of ejectment will not afford all necessary relief, the court will not intervene by injunction.

7. *Same; when injunction against should be dissolved on denials in answer.*—Where, by the averments of such bill, the complainant's title to the lands in controversy is based wholly on the fact of continuous, uninterrupted possession by it and those under whom it claims, and the defendant, in its answer, verified by affidavit, directly and unequivocally denies the fact of possession by the complainant at the time of the entry upon, and taking of the land, and also the prior possession by the complainant, or by those under whom it claims, and avers that the title and possession resided with other parties, from whom the defendant had a license or conveyance, under which it entered, and commenced the appropriation of the land, the temporary injunction, issued on the filing of the bill, should, on motion, be dissolved; it being clear that less injury would result to the complainant from its dissolution, than would result to the defendant from its continuance to the final hearing.

APPEAL from Calhoun Chancery Court.

Heard before Hon. N. S. GRAHAM.

The case made by the record is stated in the opinion.

INZER & GREENE and JNO. H. & J. M. CALDWELL, for appellants. (1) The jurisdiction of the City Court of Selma, and the powers and authority of the judge thereof, in the matter of issuing remedial writs, are limited to the county of Dallas. This point discussed, and the following citations made and commented on: Con. of 1875, Art. VI, §§ 2, 6, 13; Code, 1876, § 3867; 1 Brick. Dig. p. 675, § 512; Pamph. Acts,

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1875-6, p. 386. (2) A court of equity should not interfere by injunction, where the right is doubtful, or the investigation by a jury as to facts in dispute is required.—*Roath v. Driscoll*, 52 Am. Dec. 352; *Snowden v. Noah*, 14 Am. Dec. 547; *Hart v. Mayor, etc.*, 24 Am. Dec. 165; *Nevitt v. Gillespie*, 26 Am. Dec. 696. See also 3 Wait's Ac. & Def. p. 683, §§ 3, 4; *Ib.* p. 685, § 9; *Ib.* pp. 694, 700, 701, 702, 761; High on Inj. p. 7, § 8; *N. O. & S. R. R. Co. v. Jones*, 68 Ala. 55; *Boulo v. N. O., M. & T. R. R. Co.*, 55 Ala. 480; 44 Am. Dec. 422. (3) The injury threatened must be of such a nature as will cause irreparable damage, not susceptible of pecuniary compensation.—3 Wait's Ac. & Def. p. 701; *Ib.* p. 761, § 6. See also 1 Brick. Dig. p. 673, § 482, 486; 35 Ala. 599; *Jones v. N. O. & S. R. R. Co.*, 70 Ala. p. 230; High on Inj. § 391. (4) "Mere general averments of irreparable mischief is not enough, but the facts constituting such mischief should be set forth."—3 Wait's Ac. & Def. 701. (5) On the coming in of an answer either admitting or denying the allegations of the bill, the court will, on motion, dissolve the injunction, and dismiss the bill, if it is wanting in equity.—1 Brick. Dig. p. 677, §§ 546-7. (6) When the answer positively denies the averments of the bill, the general rule is, that a temporary injunction must be dissolved; the exception being, where irreparable mischief will follow, or the intervention of special circumstances, taking the case out of the rule.—*Satterfield v. John*, 53 Ala. 127; *Yonge v. Shepperd*, 44 Ala. 315; *Mobile School Com'ers v. Putnam*, 44 Ala. 506. See also 1 Brick. Dig. p. 677, § 548; *Bibb v. Shackelford*, 38 Ala. 611; High on Inj. p. 218, § 388.

HEFLIN, BOWDON & KNOX, *contra*. (1) Upon a motion to dissolve an injunction, all amendable defects in the bill will be considered as amended, *pro hac vice*. Consequently, if the bill has equity, mere want of fullness of statement, or clearness of averment will not be regarded. Such objections are good on demurrer, but not on a motion to dissolve an injunction.—*Chambers v. Alabama Iron Co.*, 67 Ala. 353. (2) The equity of the bill rests upon the ground, that the building of a railroad upon another's land is a permanent and irreparable injury, for which there is no other adequate remedy. This point discussed, with following citations: 1 Railway Cases, 135; *N. O. & S. R. R. Co. v. Jones*, 68 Ala. 48; High on Inj. §§ 391 *et seq.* (3) The equity of the bill is fully sustained, not only on the general jurisdiction of the court to restrain the construction of a railroad upon another's land, but upon the additional ground, that the construction of such road so near to the complainant's road, will impair, if not permanently destroy the value of complainant's property. (4) If it be con-



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ceded that the answer fully denies the equity of the bill, this court will not disturb the injunction. Cases of this sort are left largely to the discretion of the chancellor, and this court will not disturb his decree, unless it is clearly erroneous. In this case, the chancellor guarded the interests of respondents, by increasing the bond, thereby affording them ample protection.—*Bibb v. Shackelford*, 38 Ala. 611; *Chambers v. Alabama Iron Co.*, 67 Ala. 353. And where a railroad company has been enjoined from the use of land, without having made payment or tender of damages, as provided in its charter, and without the consent of the owner, the injunction will not usually be dissolved, on motion, before the hearing upon the merits.—High on Inj. § 392; *Ross v. Elizabethtown, etc.*, 1 Green Ch. 422. (5) The denials of the answer discussed. (6) There is nothing in the objection, that the judge of the City Court of Selma had no jurisdiction to issue the injunction. The statute creating the court expressly confers on him the power.—Pamph. Acts, 1875-6, p. 386.

BRICKELL, C. J.—The case comes before the court on appeal from a decree of the chancellor rendered in vacation, upon a motion made, on bill and answer, for the dissolution of a temporary injunction, restraining the appellants from the continuance of the construction of a railway on lands claimed by the appellee as part of its own right of way. The temporary injunction was granted by the judge of the City Court of Selma, the bill being filed, and the lands situate in Calhoun county.

The first ground for the motion, now pressed in argument, is, that the judge of the City Court of Selma has not the power to grant an injunction which is to be operative without the county of Dallas. If this were conceded to be true, a motion for the dissolution of the injunction is not the appropriate remedy for the correction of the error or irregularity. A motion to dissolve can be founded only on a want of equity apparent on the face of the bill, or on a full and complete denial, by the verified answer of a material defendant, of the allegations upon which the equity of the bill depends. The motion itself is a waiver of the error or irregularity, if any, which may have attended the order for the issue of the writ, or which may be in the writ alone. These are available only upon motion for a discharge of the injunction, which must precede any act on the part of the defendant in recognition or affirmance of its regularity.—*Jones v. Ewing*, 56 Ala. 360.

The City Court of Selma is an inferior court of law and equity, established by an act of the General Assembly, in and for the county of Dallas. It is styled an inferior court, not be-

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cause of limitations upon its jurisdiction, but because its judgments and decrees, like the judgments of the circuit court, and the decrees of the court of chancery, are open to revision on appeal to this court, and may here be reversed or affirmed; and over the court, as over all the judicial tribunals of the State, this court can exercise a general superintendence and control.—*Nugent v. State*, 18 Ala. 521; *Ex parte Roundtree*, 51 Ala. 42. By the statute creating it, the judge, in general terms, is clothed with power and jurisdiction co-extensive with that which is exercised by chancellors and judges of the circuit court; the statute proceeding to declare specially that the power and jurisdiction include “the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne exeat*, and all other remedial writs.” It is true the court is organized for the county of Dallas; that is the locality in which it dwells, and to which its jurisdiction is confined. But the jurisdiction of the court is distinguishable from the authority of the judge to grant remedial writs, which are mere auxiliaries to the exercise of jurisdiction, and which, when returned to the court to which they are issued, are subject to its control, and are temporary in their operation. It is a well defined legislative policy, intended to expedite the administration of justice, to confer on all judicial officers, of the jurisdiction and dignity of the judge of the city court, authority to issue, or to order the issue of such writs, returnable into any court of the State having jurisdiction of them. And it was in view of this policy, that, in express terms, the authority to issue such writs was conferred upon the judge of the city court, and not left to be derived by implication from the general grant of jurisdiction and power. We are, therefore, of opinion, that the judge of the city court had authority to order the issue of the writ of injunction.

The allegations of the original bill are, that the complainant, the “East Tennessee, Virginia & Georgia Railroad Company,” is a corporation created by, and organized under the laws of the State of Tennessee; that in 1881, by purchase, it acquired the property and franchises of the Selma, Rome & Dalton Railroad Company, which had a line of railway in this State, extending from Selma in a north-easterly direction to Prior’s station, at or near the boundary line of the State of Georgia. Prior to, and at the time of the purchase, and continuously from the year 1870, the Selma, Rome & Dalton Railroad Company and its alienees had, and was possessed of a right of way along its road-bed, extending through the county of Calhoun, of one hundred feet, that is, of fifty feet on each side of the road-bed, computing from its centre. After the purchase, the complainant entered upon, and became possessed of such

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right of way, remaining in possession until the grievance committed by the defendants. Without the consent of the complainant, the defendants, in February, 1884, entered upon a designated part of the said right of way, not having had the same condemned by any judicial proceeding, not having made or offered to make compensation to the complainant, and commenced the construction thereon of the track or bed of the "East & West Railroad Company of Alabama." The construction and completion of the said track or bed will be of irreparable injury to the complainant, because, in particular places, the track or bed of the two roads will be in less than thirty-two feet of each other, and, in the words of the bill, will be "too close together for safe and convenient operation; too close together to admit of side tracks between, of convenient and suitable length and curve."

The first point for consideration, not now looking to the answer, is, whether, upon the facts stated in the bill, a case of equitable jurisdiction is presented. For, although a motion to dissolve an injunction is submitted and heard in vacation, it should be sustained, the injunction ought not to be longer continued, whether the answer is, or is not sufficient, if it be apparent that the bill is without equity. The motion to dissolve, it ought, however, to be observed, can not and does not perform the office of a demurrer. It is not the form of the bill, nor the manner in which the facts are stated, nor the specific prayer for relief, which are of importance. All amendable defects, *pro hac vice*, should be regarded as cured by amendment, and the inquiry made, whether, if the facts were well pleaded, the case would be of equitable jurisdiction, and an injunction the appropriate remedy.—*Chambers v. Ala. Iron Co.*, 67 Ala. 353.

The principle upon which a court of equity proceeds, in interfering to prevent bodies corporate having compulsory power to enter upon, take and appropriate for their own uses, the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, or of nuisances, or of trespasses, when only private rights, or the acts of persons, natural or artificial, not having such powers, are involved. In the latter class of cases, if the right be strictly legal, and there is no relation of privity between the parties, it is of the essence of the jurisdiction of the court, that a case of irreparable injury be shown; a case for which the courts of law do not furnish an adequate remedy. The Constitution not only compels all corporate bodies, public or private, or all individuals who may be armed with the power of taking private property, but it compels the State and all its agencies and instrumentalities, to the duty



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of first making just compensation to the owner. The duty is clearly expressed in the twenty-fourth section of the "Declaration of Rights," directed to any and every taking of private property, without regard to the agency or instrumentality through which it may be taken, in these words: "But private property shall not be taken or applied for public use, unless just compensation be first made therefor." The property and franchises of corporations, it is declared, are as subject to the right of eminent domain, as is the property of natural persons, but here, as in all other cases, it is declared, just compensation must attend or precede the taking and appropriation. And, again, it is declared by the seventh section of the fourteenth article: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured or destroyed, by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction." It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to the preservation of the best interests of the community, that all who are invested with the right of eminent domain, with the extraordinary power of depriving persons, natural or artificial, without their consent, of their property, and its possession and enjoyment, should be kept in the strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the Constitution. A court of equity will intervene to keep them within the line of authority, and to compel obedience to the Constitution, because of the necessity that they should be kept within control, and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. The owner of the land has the right to say that, unless they keep within the strict limits prescribed by law, they shall not disturb him in the possession and enjoyment of his property. The power is so capable of abuse, and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner. And it will intervene, though, as in the present case, the contest may be between two incorporated companies.—*Kerr on Injunctions*, §§ 622 *et seq.*; *M. W. R. R. Co. v. Owings*, 15 Md. 199; *Bonaparte v. C. & A. R. R. Co.*, 1 Baldwin 205; *Commonwealth v. P. & C. R. R. Co.*, 24 Penn. St. 159.

It is not of importance, therefore, to subject to analysis the

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allegations of the bill, and determine whether irreparable injury, in the sense of that term in a court of equity, is shown by them. If, in this respect, they are too general, the defect would be curable by amendment, and, however available on demurrer, will not support a motion for the dissolution of the injunction. We do not, however, intend resting our decision upon this point. It is affirmatively and distinctly averred that lands of which the complainant was possessed, have been wrongfully taken possession of by the defendants, and are being appropriated to the uses of the defendant corporation, which has not proceeded to their condemnation in the mode prescribed by law, and has not, in obedience to the Constitution, made therefor just compensation. These facts, of themselves, without regard to any question of irreparable injury, give the court jurisdiction to prevent the further invasion of the property. The necessity for keeping the defendant corporation within the limits of its authority, and for compelling obedience to the Constitution, is apparent; and it is this necessity which is the foundation of the jurisdiction of the court.

The averments of the bill deduce the title of the complainant to the lands, the subject of controversy, wholly from its possession, and from the antecedent possession of its privies or predecessors in estate, so long continued as to be evidence of title. Whether the title was derived originally from the license, or from the conveyance of the owner, or through judicial proceedings to which they were parties, is not averred. The fact of continuous, uninterrupted possession is vouched as the foundation and evidence of the right and title of the complainant. And, in this connection, it must not be overlooked that it is not the track or road-bed of the complainant, nor any of its side-tracks, or other like appurtenances of visible, notorious, continuous use, which form the subject of controversy. Beyond these, though within fifty feet of the centre of the track or road-bed of the complainant, the parcel of land in controversy is situated. The answer is in direct, unequivocal denial of the fact of possession by the complainant at the time of the entry upon, and taking of the land, and in like denial of a prior possession by the complainant, or by its privies or predecessors in estate. And, with equal clearness and distinctness, it affirms that the title and possession resided with other parties, from whom the defendant corporation had a license, or conveyance, under which it entered upon possession, and commenced the appropriation of the lands. The answer, in so far as it is in denial of the possession of the complainant, and of the possession of its predecessors or privies in estate, is directly responsive to the allegations of the bill, and is in denial of all the right and title to relief vouched by the complainant. It is

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more than a denial of the right and title of the complainant; it is the assertion of right and title in the defendant corporation, rendering strictly lawful its entry upon, and its possession and appropriation of the lands. Though relief is granted more readily to a land-owner, whose lands are entered upon by a corporation having compulsory powers to take them for its own uses, and upon a different principle, than in cases of trespass, waste or nuisances, yet, as in such cases, if the right and title of the party complaining are not clear, or if the whole controversy resolves itself into a naked dispute as to the strength of the legal title, and it be not shown that an action of trespass, or of ejectment will not afford all necessary relief, the court will not intervene by injunction.—1 High on Inj. § 629; *Boulo v. N., M. & T. R. R. Co.*, 55 Ala. 480. The necessity which induces the intervention of the court springs from the duty of the corporation not to enter upon, and dispossess the true owner, without his consent, or without the course of judicial proceedings, which the statute prescribes, and the payment of just compensation, as demanded by the Constitution. The court will not intervene to quiet titles, or to decide controversies as to the title. There are other and more appropriate remedies and tribunals for the determination of all such controversies. Taking the averments of the answer as true, and, upon this motion, so far as responsive, they must be deemed true, the case does not fall within the principle upon which the court has proceeded in cases of this character. There has been no invasion of the possession or property of the complainant, and the true owners, having possession, to whom only the defendant corporation owed duty, have not been dispossessed without their consent. The observation of the Vice Chancellor, in *Webster v. S. L. R. Co.*, 1 Simons (N. S.), 277 (40 Eng. Ch.), that when the corporation has treated with one in possession, claiming to be the owner, and acquired the right to enter upon, and possess the lands, the court should not interfere, and *brevi manu* arrest its operations at the instance of a third person, of whose claim and title the corporation had not notice, has a direct application to the case. If, in such a case, the court interfered, there is much of reason to apprehend that often it would do as great injury, as that which it is solicitous to avert. A temporary injunction could and would not infrequently be sought for the purpose of pressing the corporation into a compromise, or into terms with parties, who, it could show eventually, were without a right to relief, to whom no wrong had been done.

The general rule is well settled, that if a verified answer fully and unequivocally denies the material allegations upon which the equities of the bill depend, a temporary injunction



[East & West R. R. Co. of Ala. v. East Tenn., Va. & Ga. R. R. Co.] will be dissolved. The rule is of more inflexible application to bills enjoining proceedings in courts of common law, than to special injunctions for the prevention of the invasion of property, or of irreparable injury. In cases of special injunctions, though the answer may be in direct negation of the equity of the bill, the court exercises a sound judicial discretion, and will retain the injunction, if it be clear that greater injury will result to the complainant from its dissolution, than will result to the defendant from its continuance to the final hearing. *Bibb v. Shackelford*, 38 Ala. 611; *Chambers v. Ala. Iron Co.*, 67 Ala. 353; 2 High on Inj. §§ 1508 *et seq.* Upon this point there does not seem to us any real difficulty in the case. The right of the defendant corporation to take the lands, if necessary to the construction of its railway, by appropriate judicial proceedings, upon making just compensation, if they prove eventually to be the property of the defendant corporation, can not be doubted. The property and franchises of a corporation may be taken for public uses, equally with the property of the citizen.—*A. & F. R. R. Co. v. Kenney*, 39 Ala. 307. And now the Constitution forbids the abridgment in this respect of the right of eminent domain. The grievance or injury which the complainant may suffer from a dissolution of the injunction is temporary, if eventually it proves to be the owner of the lands; there is only delay in making just compensation. But if the injunction be continued, the defendant corporation hindered and delayed in the construction of its railway, adequate pecuniary compensation in damages is not practicable; and the public, having an interest in the construction of the railway, will be subjected to inconvenience. Weighing, then, all considerations which it is proper to indulge in determining whether the injunction shall be dissolved, or shall be continued, the preponderance favors a dissolution; there is less of injury and inconvenience to the parties, than would result from its continuance. There is no question of the ability of the defendant corporation to make just compensation to the complainant, and the only possible injury which can result to the complainant is delay in receiving the compensation.

The decree of the chancellor must be reversed, a decree here rendered dissolving the injunction, and the cause remanded.

[Smith v. Freeman and Bynum.]

**Smith v. Freeman and Bynum.***Assumpsit.*

1. *Assignment of error; when can not be considered.*—The record showing, on a defendant's appeal, that the plaintiff demurred to a special plea, assigning *nine* grounds, and that the court sustained the *tenth* ground, an assignment of error, that the primary court erred in sustaining the demurrer, can not be considered, the court being unable to know what is covered by the assignment.

2. *Evidence; when acts of party inadmissible for him.*—Where, in an action on a bond or note alleged to have been given for the purchase-money of land, the issue was, whether the purchase of the land was ever in fact consummated, acts of the defendant, done long after the alleged trade, and in the absence of the vendor, inconsistent with the fact of purchase, are not admissible in evidence for him.

3. *Statute of frauds; when note on bond given for land not void under.* A plea of the statute of frauds (Code, 1876, § 2121, subd. 5) is not available to a defendant sued on a bond or note, given for the purchase-money of land, in which the consideration is expressed as all the vendor's "title or claim to property bought of W. R. L. and J. J. G., and known as the Gentle property," although the note or bond was the only writing executed in reference to the sale of the land.

4. *Plea of want of consideration; when not available.*—It was further held that under the facts in this case, as hypothetically stated in charges given at the plaintiff's request, the plea of a want of consideration in the note or bond sued on was not available to the defendants.

APPEAL from Jackson Circuit Court.

Tried before Hon. H. C. SPEAKE.

This suit was brought by Freeman & Bynum against Barton B. Smith; was founded on a bond executed by the defendant to one Finney, and by the latter transferred to the plaintiffs; and was commenced on 24th January, 1880. The cause was tried on issue joined on the pleas of the statute of frauds and want of consideration, among others, the trial resulting in a verdict and judgment for the plaintiffs. A special plea numbered five, referred to in the opinion, was also filed, the averments of which need not be here stated.

The plaintiffs read in evidence the bond sued on, which, omitting the signature, is in these words: "Larkinsville, Alabama. Twelve months after date I promise to pay A. Finney the sum of five hundred 47-100 dollars, for all his title or claim to property bought of W. R. Larkin and J. J. Gentle, and known as the Gentle property; as witness I set my hand and seal, January 23, 1879." There is a material conflict in the evidence as to the circumstances under which the bond was exe-

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cutted, and as to its consideration. As the plaintiffs' evidence tended to show, in 1874, the defendant sold to Jefferson Gentle, a designated unimproved lot of land in the town of Larkinsville, and afterwards furnished Gentle lumber and materials with which the latter erected improvements on said lot. On 1st January, 1876, Gentle, owing defendant a balance for said lot, lumber and materials of \$463.91, executed to him his bond for said sum, on which there was due, in January, 1879, the sum of \$243. The sale of said lot was by parol, the defendant retaining the title. In January, 1879, Finney agreed to sell to Gentle a tract of land known as the Hopkins place, for which the former held a bond for title, there being then due on the purchase-money about \$1000. The agreed price for this place was \$2000; and in payment therefor, Gentle agreed to pay off and satisfy said balance, and to convey to Finney the lot in Larkinsville purchased from the defendant, the title to which still remained in the defendant. The defendant, at the request of Finney and Gentle, assented to the land trade which they had made, and agreed to convey the lot in Larkinsville to Finney. At the time of said trade, Finney was in possession of the Hopkins place, and Gentle of the lot in Larkinsville. Gentle was then placed in possession of the Hopkins place, and Finney sold the Larkinsville lot to the defendant for a stated sum, of which, according to agreement, the defendant paid part by transferring to Finney Gentle's bond to defendant, of date 1st January, 1876, and for the balance he executed the bond sued on, and took possession. The trade between Finney and Gentle was not in writing, and the only writing evidencing the trade between Finney and the defendant was the bond on which this suit is founded.

The evidence introduced on behalf of the defendant tended to show, that his assent to the trade made between Finney and Gentle, his agreement to convey, and his subsequent purchase from Finney were conditional, depending on, *inter alia*, the consummation of the trade between Finney and Gentle; that said trade was never consummated; and that he never, after said trade, acquired possession of the lot in Larkinsville under Finney, or by virtue of the trade made with him, but under an arrangement with Gentle. One Perkerson was examined as a witness on defendant's behalf, who testified that, in 1881, he bought of defendant said lot in Larkinsville for \$800, and that he purchased "with notice of Gentle's claim thereon, and with Gentle's consent, and with the agreement that Gentle should have the right to redeem, and all rights that he had against Smith in relation to said lot." Said witness having further testified, on cross-examination, that Smith "had executed to him a deed, not reserving therein in writing any of said rights



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of Gentle, and that there was no written agreement that Gentle should have the right to redeem," the court, on plaintiffs' motion, excluded from the jury all the testimony of said witness; and to this ruling the defendant excepted.

Charges 6 and 8, given at the plaintiffs' request, referred to in the opinion, are in these words: 6. "A man in the possession of land, who has bought it, and given his notes for the purchase-money, notwithstanding he may have no deed or title to the land, and may never have paid the purchase-money, may still make a valid sale of said land to a third party, and take a note for the amount due him; and such a note would be supported by a valid consideration, and could be enforced by suit." 8. "If the jury believe from the evidence, that Finney sold the Hopkins' place to Gentle, and he agreed to pay him \$2000 for it, which was to be paid by Gentle's letting Finney have a house and lot in Larkinsville, known as the Gentle house and lot, at the sum of \$1000, and to pay to H. H. Hopkins the balance of \$1000, or so much thereof as might be due to Hopkins; and he, Gentle, went into the possession of the Hopkins land, and either Finney himself, or B. B. Smith, by his direction or consent, went into the possession of the Gentle house and lot in Larkinsville, and these exchanges of possession were by reason of, and under these contracts, then Smith's possession of the house and lot would be a possession derived from, or through Finney, and Smith would then be holding under Finney; and this being found by the jury, and the further fact, if it be found to be true, that B. B. Smith gave the note in suit for the purpose of acquiring this possession and right of Finney, and he has not since been dispossessed of said property by Finney or Gentle, then Smith can not defend himself on a plea of the failure of consideration, without surrendering said possession, or showing some fraud or misrepresentation in regard to the Gentle house and lot." Charge 9, requested by defendant, and refused by the court, also referred to in the opinion, is in these words: "If the jury find from the evidence, that Smith got possession of the lot in Larkinsville from Gentle, and that Finney never had possession of said lot, either actual or constructive; and that Finney had no title or interest in said lot; and that the bond sued on was given for Finney's interest in said lot, then there was a failure of consideration, and the jury should find for the defendant."

To the rulings above noted, as well as to numerous others not necessary to be set out in this report, the defendant duly excepted; and they are here assigned as errors.

WALKER & SHELBY, for appellant.

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R. C. HUNT and ROBINSON & BROWN, *contra*.

STONE, J.—It is assigned as error that the circuit court sustained plaintiffs' demurrer to the fifth plea. The record shows the circuit court sustained the tenth ground assigned in demurrer. Only nine grounds are shown to have been assigned. We are not able to know what is covered by the assignment, and can not consider it.

There was no error in excluding the testimony of Perkerson. It related alone to acts of Smith, done long after the alleged trade with Finney, and in the absence of both Finney and his transferees. To allow such testimony to explain or qualify a previous contract between Smith and Finney, would be allowing Smith to make evidence for himself.—1 Brick. Dig. 834, §§ 423-4.

Many rulings were made, and many others invoked, looking to the avoidance of the alleged purchase of Smith from Finney, on the plea of statute of frauds.—Code of 1876, § 2121, subd. 5. The present suit is against Smith, founded on a writing signed by Smith, and the object of the suit is to charge him, Smith. No other person is sought by this suit to be charged. Now, the consideration of the note or bond is expressly set out in the writing itself. Its language is, "for all his (Finney's) title or claim to property bought of W. R. Larkin and J. J. Gentle, and known as the Gentle property." This description would be sufficient in a complaint in ejectment, for it must be supposed that from this description the identity of the lots can be ascertained.—3 Washb. on Real Prop. (4th Ed.) 398-9; *Phillips v. Adams*, 70 Ala. 373; *Cooper v. Hornsby*, 71 Ala. 62; *Horton v. Wollner*, *Ib.* 452. This case is thus narrowed down to the consideration of a few charges, given and refused.

Charges 6 and 8 given at the instance of plaintiffs, are correct expositions of the law.—*Tobin v. Bell*, 61 Ala. 125. Charge 9, asked by defendant and refused, is faulty in two respects. It refers to the jury the construction of a written instrument, and is in other respects liable to mislead the jury.—1 Brick. Dig. 339, §§ 59, 60, 61; *Ib.* 337, § 27. There is nothing in the other exceptions.

Affirmed.

[Watts v. Rice &amp; Wilson.]

**Watts v. Rice & Wilson.***Contest of Claim of Exemption.*

1. *Judgments; conclusiveness of.*—Judgments are conclusive of all facts or issues actually decided, or necessarily involved, but not of facts collaterally involved.

2. *Attachment against partnership by firm name; on what property leviable.*—An attachment against a partnership by its firm or common name, without mention of the names of the individual partners, can only be levied on partnership property; it can not be levied on the individual property of the partners.

3. *Same; extent of recovery on bond.*—In a suit on a bond executed for the purpose of suing out an attachment against a partnership by its firm name, payable to the partnership by its firm name, and conditioned, in the event of a failure to prosecute the attachment to effect, to pay the defendants, as partners, "all such damages as *they* might sustain from the wrongful or vexatious suing out of such attachment," no recovery can properly be had for any damage sustained by one of the partners, by reason of a wrongful levy of the attachment on his individual property.

4. *Same; suit on bond; what admissible as evidence of malice.*—In such case, however, it is competent to prove such levy, and attendant circumstances of aggravation, wantonness or gross negligence, for the purpose of proving that legal malice which authorizes the recovery of exemplary damages.

5. *Same; res adjudicata.*—In a suit on a bond, executed for the purpose of obtaining an attachment against a partnership by its firm name, and conditioned, on failure to prosecute the suit to effect, to pay the defendants, as partners, "all such damages as *they* might sustain from the wrongful or vexatious suing out of such attachment," evidence was introduced showing that the individual property of one of the partners, of the value of more than three times the amount of the debt claimed in the attachment, and more than the penalty of the bond, was levied on under the writ; it not appearing for what purpose the evidence was introduced, or that its admissibility was sought to be limited, or that the value of the property actually entered into the verdict of the jury as an element of damage, otherwise than as may be implied by presumption of law from the facts in evidence. *Held,*

(a) That the recovery of the value of such property, or the liability of the defendants for it, was not one of the issues actually decided, or necessarily involved in the suit on the attachment bond, and it was not, for this reason, *res adjudicata* between the parties.

(b) That a judgment in favor of the plaintiffs in the suit on the bond for the full penalty, though paid, does not estop the partner whose property was levied on from claiming it, in the attachment suit, as exempt.

APPEAL from the City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

The facts are sufficiently stated in the opinion.



[Watts v. Rice &amp; Wilson.]

RICE &amp; WILEY, for appellants.

J. M. FALKNER and R. M. WILLIAMSON, *contra*.

SOMERVILLE, J.—The present case is one involving the trial of a claim of exemption to personal property levied on under a writ of attachment sued out by Rice & Wilson. Code, 1876, § 2830. The property levied on is the individual property of the appellant, Watts. The attachment suit was against Nathaniel Watts & Co., under their *common name* as a mercantile partnership, without designation of the individual names of the persons comprising the partnership.

The charge of the court, instructing the jury to find for the appellees, can be justified only upon the theory that the matter in dispute is *res adjudicata*. It is insisted that the appellant has already recovered *the value of his property*, here claimed, in a suit brought by *Watts & Co.* against the appellees, claiming damages on the attachment bond for the wrongful and vexatious suing out of the writ of attachment against the partnership. The argument is, that this judgment of recovery operates as an estoppel in this suit.

The rule is, that judgments are conclusive only as to all facts or issues actually decided, or necessarily involved. This does not embrace facts which are merely collateral, but only such as are directly and distinctly put in issue, and a finding of which is necessary to uphold the judgment.—*McCalley v. Robinson's Adm'r*, 70 Ala. 432; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; Freeman on Judg. § 257.

It is shown that Watts & Co. sued Rice & Wilson on the attachment bond, and recovered judgment against them for the full penalty of two hundred dollars, the entire amount of which had been discharged by payment before the present trial. In this suit for damages, evidence was introduced as to the value of the individual property of Watts, which had been levied on under the writ in this proceeding, showing that the property was worth, at the time of seizure, the sum of three hundred and thirty-five dollars, or more than three times the amount of the debt claimed in the original attachment suit, and more than a hundred dollars in excess of the full penalty of the attachment bond. It does not appear for what purpose this evidence was introduced, or that its admissibility was sought to be at all limited. Nor does it appear that the value of this property actually entered into the verdict of the jury as an element of damage, otherwise than as may be implied by presumption of law, from the facts in evidence.

It is our opinion that this can not be inferred from the facts before us. The original attachment, it is important to remem-

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ber, was sued out against the partnership of Watts & Co., by its firm or common name, without mention of the names of the individual partners. Such suits are authorized by section 2904 of the present Code, of 1876. But it is well settled, that where a judgment is rendered under the provisions of this statute, it only binds the joint property of the firm, and an execution issued on such judgment can be levied only on the partnership property. It does not bind the property of the several individual partners, and *can not lawfully be levied upon such separate property*. Such suits have been characterized as somewhat in the nature of a proceeding *in rem* rather than *in personam*.—*Yarborough v. Co. v. Bush*, 69 Ala. 170; *Haralson v. Campbell*, 63 Ala. 278; *Wyman v. Stewart*, 42 Ala. 163.

The attachment bond, also, was payable to Watts & Co., as a partnership, describing them by their firm or common name, and the condition was, in the event of a failure to prosecute the attachment to effect, to pay the defendants—as partners—“all such damages as *they* might sustain from the wrongful or vexatious suing out of such attachment.”—Code, 1876, § 3256. It seems to us that in a suit on a bond of this nature, no recovery can properly be had for any damage sustained by one of the individual partners for a wrongful seizure of his property, nor does the bond import that the partnership as such can recover the *value* of such property, based upon its wrongful destruction or seizure by the officer levying the attachment writ. Such bonds are not required for the protection of the officer, nor for the indemnification of third persons whose property may be wrongfully attached, but simply for the benefit of *the party defendant against whom the writ is issued*. Drake on Attach. § 162; *Davis v. Commonwealth*, 13 Graton, 139.

The rule might be entirely different in a case where the attachment suit had been brought against *individuals* doing business under a partnership name, which is the common and more ordinary way. Such a writ may be levied on the *separate*, as well as the joint estate of the partners, and the condition of the bond may for this reason cover a loss sustained by levying on such separate property.—Code, 1876, § 3270; *Boyd v. Martin*, 10 Ala. 700.

The general rule is, that, in actions *ex delicto* brought by *partnerships*, damages can be recovered only for injuries to the *joint* business, property or trade of the copartnership, and injuries done either to the private feelings or the private property of the individual partners do not constitute a proper subject of injury in such suit.—*Donnell v. Jones*, 13 Ala. 490; Story on Part. § 257; Parsons on Part. \*338. So, in actions *ex contractu*, as well, all the parties plaintiff must be entitled to recover, or

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the suit can not be maintained.—*Cochran v. Cunningham*, 16 Ala. 448.

Keeping these principles in view, it does not follow that the value of Watts' separate property, which was levied on wrongfully under the original writ of attachment against Watts & Co., entered as an element of damage in the suit brought by them against Rice & Wilson on the attachment bond. It was competent, however, to prove such levy, and the circumstances of aggravation, wantonness or gross negligence attending it, in proof of that legal malice which would authorize the recovery of exemplary damages.—*Lienkauf v. Morris*, 66 Ala. 406. The existence of an evil motive, manifesting itself in an act of wrong or oppression against the property of one partner, would not only be relevant, but quite persuasive to show legal malice against a firm of which he was a member, if perpetrated under color of legal process issued against such firm or partnership. It might be possible to destroy the credit and business of a partnership by a wrongful levy made upon the separate property of the only solvent partner, and in such a case damages could no doubt be recovered by the firm on proper proof. But the measure of actual damages would not be the value of the separate property thus seized, nor the injury done to it, with interest, except, perhaps, in those cases where the process is issued against the partnership otherwise than by its firm or *common name*, and is authorized by law to be levied upon the separate property. Such, as we have shown, is not this case. In *Boyd v. Martin*, 10 Ala. 700, *supra*, where suit was brought in debt on an attachment bond executed by the defendants to the plaintiffs, it was held that a recovery could be had for damages sustained by the levy of the process on the separate property of each. The interest in the damages was held to be joint, upon the ground that the covenant was entered into with both of the plaintiffs jointly, and that the writ of attachment could be lawfully levied upon the property of both, or of either. Such damages were supposed, in other words, to enter into the mutual contemplation of the contracting parties, because coming within the condition of the bond.

It could not be supposed that such was here the case. The writ was properly leviable only on the joint property of the partnership. The indemnity was intended to cover only such damages as the firm, distinguished from the individual members composing it, should suffer by the wrongful or vexatious suing out of the process. The actual value of the property levied on was immaterial except, perhaps, as matter of aggravation, to show motive. It could not enter, as the value of joint property might do, as an element of *actual* damage into the verdict of the jury. The recovery of such property, or



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the liability of the defendants for it, was not one of the issues actually decided, or necessarily involved in the suit brought by Watts & Co. against Rice & Wilson on the attachment bond. This matter was not, for this reason, properly speaking *res adjudicata* between the parties litigant.

The judgment must be reversed, and the cause remanded.

STONE, J., dissenting.

## Falk v. Hecht.

*Bill in Equity by Married Woman to have vacated and set aside Mortgage on Land, her Statutory Separate Estate.*

1. *Mortgage of wife's statutory separate estate void.*—A mortgage, purporting to be executed by a married woman alone, and to convey lands belonging to her as her statutory separate estate, is void, because of her want of capacity to execute it, and because the husband does not join in its execution.

2. *Relief of married women from disabilities of coverture ; statute strictly construed.*—The statute conferring on the chancellors or this State power to relieve married women of the disabilities of coverture (Code, 1876, §§ 2731-2), is the delegation of power which is in its nature, not strictly judicial, but is a part of the general prerogative power of the General Assembly to define or change the legal *status* of citizens, upon whom the general law had imposed special disabilities ; and, like all other statutory powers, it must be exercised in the mode, and for the purposes the statute appoints and declares.

3. *Same ; what essential to validity of decree.*—The mode appointed by the statute for calling such power or jurisdiction into exercise, is by a petition, or an application in the nature of a petition, filed by the wife through her next friend, and disclosing the facts which authorize the court to proceed to the rendition of the decree ; and if the wife be not the actor, or if she is the actor, and the petition does not disclose the facts upon which the court is authorized to proceed to the rendition of the decree, all subsequent proceedings are *coram non judice*, and invalid.

4. *Same ; when petition insufficient.*—Under the statute, the chancellor has no jurisdiction to confer on a married woman the capacity to engage in business, to become a sole trader, or to mortgage lands, solely and separately ; and hence, a petition filed by a married woman, which, after averring the citizenship of herself and husband, her ownership of lands described, as her statutory separate estate, that she desires to invest her means in the purchase of a stock of goods and groceries, and that unless she can mortgage her lands she can not make the investment, prays that the chancellor will render a decree, “declaring her a free-dealer, relieving her of the disabilities of coverture as to her said statutory separate estate, so far as to invest her with the right to mortgage the same, to enable her to invest her means in purchasing a stock of goods and groceries,” does not conform to the requirements of the statute ; and a decree rendered thereon, though following the words of the statute, is unauthorized and void.

[Falk v. Hecht.]

APPEAL from Lawrence Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this cause was filed on 2d May, 1883, by Fannie Falk, a married woman, the wife of Jacob W. Falk, against Joseph Hecht and her said husband, to have vacated and set aside a mortgage executed by her alone (her husband not joining in its execution), on 9th October, 1877, purporting to convey to the said Hecht a tract of land in Lawrence county, her statutory separate estate, to secure a liability of her husband; and to enjoin a sale of the premises under a power contained in the mortgage, which the said Hecht was proceeding to make. The bill avers that "the defendant Hecht affirms and will endeavor to maintain that she had the power and authority to execute said mortgage under and by virtue of a decree rendered in vacation on the 22d day of September, 1877, by Hon. H. C. Speake, chancellor of the then Northern Chancery Division of Alabama, which said decree purports to declare complainant relieved from the disabilities of coverture, so far as to invest her with the right to buy, sell, hold, convey and mortgage her real and personal property, and to sue and be sued as a *femme sole*." The proceedings before the chancellor, including the petition, answer and consent of the husband, and the chancellor's decree, are exhibited with the bill; and it is averred that the decree was unauthorized by law and void. The contents of the petition are sufficiently stated in the opinion, and the decree based thereon substantially follows the language of the statute.

On the hearing, had on pleadings and proof, the chancellor was of the opinion that the proceedings to have the complainant relieved of the disabilities of coverture were regular, and the decree valid, conferring upon her the power to execute the mortgage in controversy; and caused a decree to be entered, dissolving a temporary injunction which had been issued, and dismissing the bill. That decree is the basis of the assignments of error here made.

R. O. PICKETT, for appellant.

WHEELER & SPEAKE, *contra*.

BRICKELL, C. J.—The statute (Code of 1876, §§ 2707-9) authorizes husband and wife, by instrument in writing, attested or acknowledged as the statute directs, to sell and convey the statutory separate estate of the wife. As has been frequently said, the statute contemplates a sale, a conversion of the property of the wife into money, which may be re-invested in other property, or which may be employed for her benefit; or into

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that which is the equivalent of the property, and upon which, whether it be money, or property of some other species, the statutory uses and trusts are impressed. The power to sell does not include the power to mortgage, whatever may be the consideration of the mortgage, or of the debt it is intended to secure.—*Garrett v. Lehman*, 61 Ala. 391; *Gilbert v. Dupree*, 63 Ala. 331. The instrument now impeached, purporting to be executed by the wife alone, and to convey lands, her statutory separate estate, as a security for the payment of a debt, is, of consequence, void, because of her want of capacity to execute it. It is also void, because the husband is not a party to it, and does not join in its execution. In this State, the separate estate of a married woman in lands, whether the estate is equitable or statutory, can not be conveyed or divested by any deed or instrument, in the execution of which the husband does not join.—*Waddell v. Weaver*, 42 Ala. 293; *Ellett v. Wade*, 47 Ala. 456.

It is insisted, however, and such was the view of the court below, that the decree of the chancellor relieving Mrs. Falk of the disabilities of coverture, so far as to invest her with the right to buy, sell, hold, convey and mortgage real and personal property, and to sue and be sued as a *feme sole*, empowered her to execute the mortgage without the concurrence of her husband. Such, it may be admitted, is the effect and operation of the decree, if it is valid—if the chancellor had power and jurisdiction to render it. The power or jurisdiction, if it exists, must be derived from the statute.—Code of 1876, §§ 2731–2. The statute is a delegation to the chancellor of power in its nature not strictly judicial; it is a part of the general prerogative power of the General Assembly to define or to change the legal *status* of citizens, upon whom the general law had imposed special disabilities. Like all other statutory powers, it must be exercised in the mode, and for the purposes the statute may appoint and declare. A petition, or an application in the nature of a petition, filed by the wife through her next friend, is the mode of calling the power or jurisdiction into exercise. The petition or application must disclose the facts which authorize the court to proceed to the rendition of decree. If the wife be not the actor, or if she is the actor, and the petition does not disclose the facts upon which the court is authorized to proceed to the rendition of decree, all subsequent proceedings are invalid; they are *coram non judice*.—*Cohen v. Wollner*, 72 Ala. 233. The power to hear and determine a cause is jurisdiction; and it is *coram judice*, whenever a case is presented which calls the power into exercise. But, when a judicial tribunal is in the exercise, not of its original, inherent power or jurisdiction, but of a power or jurisdiction strictly



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statutory, which it could not exercise if a statute did not expressly confer it, the principle is too well settled to be discussed, that the jurisdiction can not be affirmed to exist, until it is made to appear that the requirements of the statute have been pursued; nothing is intended to be within the jurisdiction, except that which affirmatively appears.—*Foster v. Glazener*, 27 Ala. 391; *Gunn v. Howell*, *Ib.* 663.

The petition upon which the decree is founded, filed by the wife, avers her citizenship and that of the husband, and that she is the owner of lands described, which are her statutory separate estate. The further allegation is, that she desires to invest her means in the purchase of a stock of goods and groceries, and that unless she can mortgage her lands, she can not make the investment. The prayer is, that the chancellor will render a decree, "declaring her a free-dealer, relieving her from the disabilities of coverture as to her said statutory separate estate, so far as to invest her with the right to mortgage the same to enable her to invest her means in purchasing a stock of goods and groceries." A comparison of the petition with the statute, or with the decree which was rendered, is sufficient to show that the wife did not seek or claim the exercise of the power or jurisdiction the statute confers, but the exercise of a power which is not conferred. The capacity to engage in business, to become a sole trader, which is the capacity the wife claimed, the chancellor had not jurisdiction to confer. Nor had the chancellor jurisdiction to confer the capacity to mortgage lands, solely and separately. The decree rendered may conform to the statute—it may confer upon the wife the capacity to mortgage her lands, as well as the capacity to buy, sell, hold and convey real and personal property, and to sue and be sued as a *feme sole*. But, in this latter respect, the decree passes beyond the petition, confers capacity and works a change in the *status* of the wife, to which she did not express her assent, as the statute requires its expression, and which the chancellor could not impose upon her *in invitum*. As well, without the petition of the wife invoking the exercise of the statutory power and jurisdiction, might the chancellor have proceeded to the rendition of the decree, as to have proceeded upon a petition not showing affirmatively that the wife claimed the relief the statute authorizes, but other and essentially different relief.—*Ashford v. Watkins*, 70 Ala. 156. The decree is invalid; it did not operate to relieve the wife from the disabilities of coverture. As a consequence, the mortgage is void, a cloud upon the title, which a court of equity ought to remove.

Let the decree of the chancellor be reversed, and a decree will be here rendered granting the complainant appropriate relief.

[Turnipseed v. Fitzpatrick.]

## Turnipseed v. Fitzpatrick.

### *Statutory Real Action in the Nature of Ejectment.*

1. *Decree of sale of lands for distribution ; jurisdiction of judges of probate to render.*—The jurisdiction of judges of probate to decree, under the statute, the sale of lands held by joint owners or tenants in common, for distribution, when the same can not be equitably partitioned or divided (Rev. Code, § 3120; Code, 1876, § 3514), is limited to lands lying, in whole or in part, in the county in which the application is made; and hence, a decree of sale of lands, no portion of which lies in the county in which the proceedings are had, is void, and a sale and conveyance made thereunder do not work a divestiture of title.

2. *Allotment of homestead to widow and children of decedent under § 2061 Rev. Code ; when fatally defective.*—Proceedings had in the probate court for the allotment of a homestead to the widow and children of a decedent, under subdivision 6 of section 2061 of Revised Code, authorizing the appointment of three appraisers to lay off and set apart five hundred dollars worth of land, etc., are fatally incomplete, when it is not shown by the record that any report was made by the appraisers, or, if made, was ever, in any form, judicially passed on by the court.

3. *Dower ; jurisdiction of probate court to assign.*—The probate court is without jurisdiction to assign dower in lands, no portion of which lies in the county in which the proceedings are had; and such jurisdiction is not conferred by a special act of the General Assembly, removing the administration of the husband's estate from another county, and clothing the court with jurisdiction to settle and distribute it.

4. *Same ; character of before assignment.*—The widow's right of dower, before assignment, is purely equitable, not cognizable at law, and confers on her no specific estate or interest in the lands which she can sell or assign to another; and hence, a purchase of such right is no defense against ejectment brought by the heirs against the purchaser, nor does it entitle him to any reduction of rents.

5. *Ejectment ; rents and improvements on suggestion of adverse possession for three years, when possession under color of title, in good faith.* The provisions of section 2966 of the Code, limiting a recovery of mesne profits in real actions to damages or rent for one year prior to suit brought, as against a defendant holding possession under color of title, in good faith, do not apply to cases in which the defendant seeks to obtain the benefit of permanent improvements erected on the premises by him, on a suggestion of adverse possession for three years, under sections 2951-4 of the Code; but, in such case, a new equity is created by the statute in favor of both parties, and the defendant is allowed *full value* for his improvements, and the plaintiff *full rent* for his land.

APPEAL from Bullock Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was a statutory real action in the nature of ejectment, by Bird and James Fitzpatrick against D. C. Turnipseed, to recover a tract of land situate in the county of Bullock, in this State; and was commenced on 18th March, 1882. The defend-

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ant pleaded not guilty, and also suggested upon the record "that he had been in the adverse possession of the land sued for, for more than three years next before the commencement of this suit, claiming the same as his own, and that he had made valuable improvements thereon." The trial resulted in a verdict and judgment in favor of the plaintiff for the lands described in the complaint; the jury, by their verdict, finding the suggestion of adverse possession to be true, and assessing "the value of the improvements at \$1263, the value of the lands at \$1149.50, and the value of the use and occupation at \$750."

As shown by the evidence, Bird Fitzpatrick, sr., departed this life, intestate, in the year 1864, a resident of Pike county, in this State, seized and possessed of the lands sued for, and leaving him surviving Mrs. M. A. Fitzpatrick, his widow, and the plaintiffs, his only children and heirs at law. The plaintiffs, claiming title by descent from their father, rested their case after proving his seizin, their heirship, and the rental value of the lands. As shown by the evidence introduced on behalf of the defendant, on 6th December, 1864, B. H. Fitzpatrick and the said M. A. Fitzpatrick were appointed by the probate court of Montgomery county administrator and administratrix of said decedent's estate. This appointment was made under a special act of the General Assembly, the provisions of which, as copied in the bill of exceptions, are, that said court "shall have authority to take jurisdiction of the administration" of said estate, "to grant letters of administration thereon, and to do and perform all things necessary or proper to cause the estate of said decedent to be settled and distributed in accordance with the laws of this State, as fully and effectually as if the said decedent had been a resident citizen of said county of Montgomery at the time of his death." B. H. Fitzpatrick having died in 1867, Mrs. Fitzpatrick reported said estate insolvent, and, on such report, in May, 1868, it was duly declared insolvent; and, in 1869, it was finally settled by Mrs. Fitzpatrick, who had been continued as administratrix after the declaration of insolvency. On the settlement, however, the claims of creditors which had been filed and allowed, were paid in full, leaving a balance, which was distributed among the distributees. In May, 1868, under the decree of the probate court of Montgomery county, and on the petition of Mrs. Fitzpatrick, as administratrix of said estate, dower in the lands of said decedent was allotted and set apart to her, consisting of a part of the lands sued for in this action. The lands out of which dower was claimed, are described in the proceedings as situate in the counties of Bullock and Pike. About the same time, Mrs. Fitzpatrick made application to said court on behalf of herself and the plaintiffs, the latter then being minors, to



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have laid off and set apart, as exempt from administration and the payment of decedent's debts, lands to the value of five hundred dollars, under the provisions of the statute then embodied in section 2061 of the Revised Code. Upon this application, an order was made, reciting that it appeared to the satisfaction of the court that "said Fitzpatrick died leaving the said M. A. Fitzpatrick as his widow, and Bird and James F. Fitzpatrick, both minors under twenty-one years of age, members of his family, and that the estate of the said Bird Fitzpatrick is insolvent, and it is necessary to sell the real estate thereof for the payment of debts;" and ordering and decreeing that "the prayer of the petition be granted," and that three named persons be appointed appraisers, etc. The transcript from the records of the probate court, exhibited with the bill of exceptions, fails to show that the appraisers ever acted under said appointment, or that any other proceedings were had on said application. One of the appraisers named in said order was, however, examined as a witness by defendant, and he testified, in substance, that the appraisers did act under said appointment, and laid off and set apart to said widow and children, as exempt, the lands sued for, except the lands which had been previously assigned to the widow as dower; and that said appraisers wrote out and signed a report of their said action, which was left with one of their number to be returned to court; "but witness can not say whether or not it was so returned."

As the defendant's evidence further showed, in 1872, C. Tompkins, as guardian of the plaintiffs, appointed by the probate court of Pike county, filed a petition in said court, averring that his wards and Mrs. Fitzpatrick were joint owners or tenants in common of the lands sued for, that the lands could not be equitably partitioned or divided without a sale, and that a sale thereof would be to the interest of his wards; and praying that the lands might be sold for partition or division. The court, for the purpose stated in the petition, decreed a sale of the lands, and appointed commissioners to execute the decree, who, on 26th August, 1872, sold the lands, at public outcry for cash, the defendant becoming the purchaser, collected the purchase-money, and reported their action to the court; and thereupon a conveyance was executed, under the orders of the court, conveying said lands to the defendant, and the purchase-money was distributed among the plaintiffs and said widow. The defendant took possession of said lands under his purchase on 1st January, 1873, and has since continued in the possession thereof, claiming and holding them as his own.

The defendant also introduced evidence tending to show that, "during his occupancy of said lands under said deed, and prior

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to the commencement of this suit, he had made valuable and permanent improvements upon the same in the way of ditching and clearing up the same," the value of which is stated. The defendant's suggestion of adverse possession was admitted to be true, and it was agreed that the jury should so find. The bill of exceptions purports to set out all the evidence, the substance of which is here given.

The court charged the jury, *ex mero motu*, among other things, (1) that "if they believed the evidence, the title to the land sued for, or to any portion of it, had never been divested out of plaintiffs;" (2) that "in assessing the value of the use and occupation of the lands, the jury must assess the value of such use and occupation during the whole period of defendant's occupancy of the same;" and (3) that in ascertaining the value of such use and occupation, they "must assess the value of the use and occupation of the whole lands."

The court also charged the jury, at the plaintiffs' written request, that if they believed the evidence they must find for them for the lands sued for; and refused the following, among other charges requested in writing by the defendant: In substance, that the widow was entitled to one-third of the rents of the lands sued for; and, in ascertaining the rents which the plaintiffs are entitled to recover, "the jury can only find for them for two-thirds of the rent of the whole premises."

The defendant duly reserved exceptions to the rulings of the court in instructing the jury, above noted; and those rulings are here assigned as error.

H. C. TOMPKINS and WATTS & SON, for appellant.

DAVID CLOPTON and JAMES WEATHERLY, *contra*.

SOMERVILLE, J.—The title of the plaintiffs to the lands in controversy, which they claim by inheritance as the heirs at law of Bird Fitzpatrick, deceased, is unquestionably good, unless it has been divested by some one of the several proceedings in the probate court, which are relied on by the defendant for this purpose. These defenses we proceed now to consider.

In the first place, we have no hesitation in deciding that the proceedings in the probate court of Pike county, in the year 1872, decreeing a sale of these lands for distribution among the joint owners, or tenants in common, under the provisions of section 3120 of the Revised Code, of 1867, did not operate as a divestiture of the plaintiffs' title. The probate judge of Pike county was without jurisdiction to order the sale, for the reason that the lands were not situated in that county, but in the

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county of Bullock. We are of opinion that judges of the several probate courts in this State have jurisdiction to sell lands for *distribution*, under this section of the Code, only where the whole or a part of the land designated to be sold, lies in the county where the application is made, and the particular jurisdiction is sought to be exercised. The statute does not so declare in express words, but it was clearly intended to be taken *in pari materia* with analogous proceedings for the partition of real estate, and other property, authorized by section 3105 of the Revised Code, or, more properly speaking, originally by sections 2677 *et seq.* of the Code of 1852, relating to the partition of lands. These sections require the application to be made to "the judge of probate of the county in which the property is."—Code, 1867, § 3105; Code, 1852, § 2677; Code, 1876, §§ 3497, 693.

These statutes at first had reference only to real estate, and did not, as now, include the partition of personal or mixed property. The rule of the common law was, that actions affecting real estate were regarded as local, and were required to be instituted in the county in which the premises were situated. And this distinction between the *venue* in transitory and local actions was applicable as well in courts of equity as of common law. The theory of the law was, that local actions, being in the nature of suits *in rem*, should be "prosecuted where the thing on which they were founded was situated."—*Casey v. Adams*, 102 U. S. 66; Trial of Titles (Sedg. & Wait), § 465. "An action is local, if all the principal facts on which it is founded be local."—Stephen on Pl. (Tyler) 274. The present proceeding, at least so far as it affects real estate, is local in its nature, and it would require a very obvious expression of legislative intention to authorize us to conclude a purpose on the part of the General Assembly to discard a principle so salutary in its operation and ancient in its authority. The uniform practice, moreover, so far as we are advised, has been for the several probate judges to exercise the jurisdiction in question only within their respective counties, where the land is situated, whether in cases of application for partition or sale for distribution. It would be a practice full of injustice and evil results to permit probate judges, holding their courts upon the banks of the Tennessee river, to render decrees ordering the sales of land situated hundreds of miles away in counties contiguous to the Gulf.

We are clearly of the opinion that the probate judge of Pike county was without jurisdiction to order the sale, and the proceedings under the application made before him for this purpose were void.—*Robertson v. Bradford*, 70 Ala. 385; *Allen v. Kellam*, 69 Ala. 443; *Landford v. Dunklin*, 71 Ala. 594.



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The widow and children of the decedent, under whom the defendant claims title, acquired no title or interest in the lands by virtue of the attempted allotment of a homestead to them, under the proceedings inaugurated by her, as administratrix of her husband's estate, in the year 1868, in the probate court of Montgomery county. Her application was made under section 2061 of the Revised Code of 1867, subd. 6. This section authorized the appointment of three appraisers, whose duty it was "to lay off and set apart" five hundred dollars' worth of land, including *the homestead*, "or such portion thereof as could be selected without injury to the remaining portion of the estate." If this could not be done, the appraisers were required to lay off *other* lands, setting them apart by metes and bounds. In the event of its being impracticable to so divide the lands of the decedent as to set apart five hundred dollars worth, the widow and children were declared entitled to "five hundred dollars of the *proceeds* of sale."—Code, 1867, § 2061, subd. 6. The proceedings under this statute, so far as they appear in the record before us, are fatally incomplete. While they show an application filed, invoking the jurisdiction of the probate court, and the appointment of three persons as appraisers, they fail to show that these appraisers *ever made any report of their action to the court*, or that such report was ever judicially acted upon in any form whatever. The "selection" required to be made by these agents of the law was obviously incomplete until it was brought to the knowledge of the court in the manner required by the statute,—which was by written report—and there was some judicial action upon it. We can not be permitted to surmise, from parol testimony, that a selection was practicable, or that the court might not have deemed the applicants entitled to the proceeds of the sale in lieu of the land itself, this being an alternative relief authorized by the statute, to be adjudged in a specified contingency, the non-existence of which can not be presumed in the absence of record evidence positively affirming its truth.

So we are equally clear in the opinion that the probate court of Montgomery county possessed no jurisdiction to assign dower to the widow in the lands in controversy. These lands being situated in the county of Bullock, this jurisdiction resided only in the probate court of that county. The statute regulating the subject expressly declares that, when the dower interest can be assigned by metes and bounds, as is claimed to have been done in the present instance, the petition is required to be made to the judge of probate of the county in which the land lies, or a portion of it, in which the assignment of dower is proposed to be made.—Code, 1867, § 1631; Code, 1876, § 2239.

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The fact that the probate court of Montgomery county had jurisdiction of the settlement of the decedent's estate, by virtue of the special act of the legislature introduced in evidence, does not change the foregoing principle in the least. This act, which was approved October 3rd, 1864, operated only to confer upon the probate court of Montgomery the same jurisdiction to settle and distribute the decedent's estate as if he had been a resident of that county at the time of his death. This was required to be done, by the terms of the act itself, "in accordance with the laws of this State."—Pamph. Acts, 1864, pp. 27, 28. The laws of the State required petitions for the assignment of dower to be made to the probate judge of the county where the land, or a portion of it, was situated. The special act, so far from being repugnant to the general law, was an express affirmation of it.

The widow's right of dower, before assignment, was purely an equitable right, and conferred on her no specific estate or interest in the lands which she could sell or assign to another. *Barber v. Williams*, 74 Ala. 331. The right to rents, or mesne profits, in a court of law would follow the legal title, when coupled with the right of possession. The purchase by the defendant of the claim for unassigned dower from the widow did not entitle him to any reduction of rents in the present action, and the court properly so ruled. Before admeasurement, the claim of dower was one of which a court of law would take no cognizance in an action of ejectment, when set up by the widow's grantee claiming by purchase from her. Trial of Title to Land (Sedgw. & W.), § 129.

The evidence shows that the defendant made a suggestion upon the record of an *adverse possession* for three years next before the commencement of the suit, and asserted compensation for certain permanent improvements constructed by him, during his *bona fide* occupancy of the premises. This was under the provisions of sections 2951–2954 of the present Code of 1876, formerly embraced in the Revised Code of 1867, as sections 2602–2604. It is not denied that these provisions are applicable in cases where possession in good faith is held adversely under either color or simple claim of title.—*N. O. etc., R. R. Co. v. Jones*, 68 Ala. 48. The court, however, charged the jury that in ascertaining by their verdict the value of the use and occupation of the land, they should compute it for the whole period of such occupancy, and that there could be no acquittal of rents for the period of possession prior to one year before the commencement of the suit, under the provisions of section 2966 of the Code (1876). The latter section declares that "persons holding possession [of lands] under *color of title*, in good faith, are not responsible for damages or rent for more

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than *one year* before the commencement of the suit." It is admitted that the defendant was in possession of the land sued for, holding in good faith under a deed which constituted color of title. The contention is, that the latter section must be construed to trench on the former so as to create an exception in favor of occupants holding under color of title, operating to acquit them of all responsibility for rents, except such as accrued within one year before the commencement of the suit.

The general rule of damages in real actions in this State is, to allow mesne profits during the entire period of the defendant's unlawful detention up to the day of trial. And the same rule is made to apply, by the statute, in all actions for use and occupation as well as those instituted for the possession of lands.—Code, 1876, § 2957; 1 Brick. Dig. p. 634, § 151. The only exception is, (1) in favor of tenants in possession, claiming under a lease from some third person, who are not liable for rent beyond that in arrear at the time of suit brought, and such as may accrue during the continuance of their occupancy (Code, § 2965); and (2) "in favor of persons holding possession under color of title in good faith," against whom the plaintiff is limited in recovery to one year prior to suit brought. Code, § 2966. It is our judgment that these latter sections have a scope of operation which does not encroach upon the field intended to be assigned to the other sections having reference to improvements made under three years adverse possession.—Code, §§ 2951–2954. Each has its own area of operation. In actions of ejectment, or analogous actions for realty *generally* under the statute, if the defendant holds under *color of title* in good faith, this fact may be shown under the general issue, and the result is to diminish the recovery of damages or rent to the extent specified. But where there has been three years adverse possession, and improvements of a permanent character have been made, a new equity is made to spring into existence in favor of both parties. The defendant is allowed *full value* for his improvements, and the plaintiff *full rent* for his land—the one being adjusted by way of equitable set-off against the other. This was the more liberal rule of the civil law, and differs essentially from the rule prevailing in courts of equity, and to some extent adopted by courts of law, which allows a defendant compensation for improvements or ameliorations made in good faith only in mitigation of damages, and in no case to exceed the value of the rents and profits claimed by the plaintiff.—*N. O., etc., R. R. Co. v. Jones*, 68 Ala. 48; s. c. 70 Ala. 227; *Hollinger v. Smith*, 4 Ala. 367; *Jackson v. Loomis*, 4 Cow. 168; s. c. 15 Amer. Dec. 349, *note*; Tyler on Eject. 848–49; Taylor's Land. & Ten. §§ 698, 711. The principle in itself is purely an equitable one, in-



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tended to do exact justice to both parties litigant by mitigating the rigor of the ancient common law rule, which regarded all improvements as annexed to the freehold and passing with the recovery of the legal title, and being therefore made at the peril of the party constructing them.—*Parsons v. Moses*, 16 Iowa, 444; *Jackson v. Loomis*, *supra*. This fact must be kept in view as a proper guide in the ascertainment of the legislative intention. It is obvious that the chief purpose of section 2966, which is an independent and not a strictly amendatory statute, was to quicken the diligence of plaintiffs, by discouraging *laches* in the claim of rents as against all innocent occupants holding under proper titles.

The latter section, it is true, has been held applicable by analogy to suits in chancery, in the nature of equitable ejectment, where the defendant sets up a claim to compensation for improvements under the general rule prevailing in courts of equity. This was so declared in *Ormond v. Martin*, 37 Ala. 598, and more recently in *Dozier v. Mitchell*, 65 Ala. 511. The distinction is manifest on reflection. The policy of reducing the recovery of rents, so as to limit them to *one year* prior to suit brought, is in perfect harmony with the rule in equity, which never allowed the recovery of improvements beyond the rents charged, or except in mitigation of rents. But the sections of the Code under consideration go further, and allow to the defendant full compensation for improvements, and prohibit a writ of possession to issue in favor of the plaintiff where the value of the improvements exceed the value of the rents, except on the condition precedent to compensation.—Code, § 2953. If, in cases of the latter character, the recovery of rents should be limited, without any corresponding reduction in the value of improvements, the equitable feature of the statute would be entirely abrogated, and its main purpose be thereby defeated, which is to appropriate accumulated mesne profits, or occupation rent to pay for beneficial, permanent improvements.

The court did not err, in our opinion, in the instruction given to the jury, authorizing them to allow for use and occupation during the entire period of the defendant's occupancy. Holding under color of title would not operate, in a court of law, to abate the rents under the influence of section 2966 of the Code.

We need not consider whether the plaintiff was entitled to recover in this action for the value of the house alleged to have been removed from the premises by the defendant. The special finding of the jury, as shown by the judgment entry, makes it affirmatively appear that no allowance was made for this alleged act of voluntary waste.

The judgment of the circuit court must be affirmed.

[King v. Bolling.]

**King v. Bolling.**

*Bill in Equity by Married Woman to have vacated and set aside Mortgage on Land, her Statutory Separate Estate.*

1. *Relief of married woman from disabilities of coverture; what essential to.*—Under the statute authorizing chancery courts to relieve married women of the disabilities of coverture, approved April 15, 1873, an indispensable element of jurisdiction is the petition of the wife, declaring her wish to become a *feme sole*, so far as the statute authorizes the court so to decree and declare her; and while this element of jurisdiction must affirmatively appear on the face of the proceedings, or they will be *coram non judice*, it is not essential that the words of the statute should be strictly pursued, or that any particular words or phrases should be employed; a statement or affirmation in any terms, clearly importing her desire to avail herself of the statute, being sufficient.

2. *Same.*—If the petition, in such case, admits equally of two constructions, on collateral attack, that construction must be adopted, which will support, rather than that which will nullify the decree.

3. *Same; when decree valid.*—Where the wife's petition avers her residence and coverture, her husband's name and citizenship, and her ownership of property, real and personal, and "*asks and prays*" that she "be declared a free-dealer under the laws of Alabama, with the right to buy and sell, hold and convey real or personal property, to sue and be sued as *feme sole*, as provided by" the act approved April 15th, 1873, which is referred to by caption and date of approval, this is a substantial compliance with said act, and, on collateral attack, is sufficient to uphold a decree relieving her of the disabilities of coverture to the extent authorized thereby.

4. *Same; when consent of the husband sufficient.*—The term *free-dealer*, used in the written consent of the husband accompanying such petition, must be accepted in the same sense in which it is used in the petition; and so accepting it, it is the consent required by the statute.

**APPEAL from Shelby Chancery Court.**

Heard before Hon. THOMAS COBBS.

The bill in this cause was filed on 18th March, 1882, by Mary E. King, a married woman, the wife of E. H. King, against R. E. Bolling and others, for the purpose of vacating and setting aside a mortgage executed by the complainant and her husband to the said Bolling, in January, 1879, on a lot of land in the town of Calera, the statutory separate estate of the complainants, to secure a debt to the said Bolling therein described, and in the bill averred to have been the husband's indebtedness, together with another conveyance of said lot, subsequently executed in settlement of the mortgage debt. The relief is sought on the ground, among others, that the mortgage and other conveyance were void, by reason of the complainant's

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coverture, and the character of the estate she held in the land. As averred in the bill, and as shown by the proof, the complainant, on 10th November, 1874, filed with the register in chancery for Shelby county, a petition addressed to the chancellor, which, omitting the address, is in these words: "Your petitioner, Mary E. King, a married woman, by her next friend, William W. Pope, respectfully represents unto your Honor, that she is a married woman, the wife of Edward H. King, a citizen of Shelby county, State of Alabama; that she is the owner of real and personal property. And your petitioner humbly asks and prays your Honor, that she be declared a free-dealer under the laws of Alabama, with the right to buy and sell, hold and convey real or personal property, to sue and be sued as *feme sole*, as provided by an act of the legislature of Alabama, entitled, 'An act to confer upon the several chancery courts of the State power to declare married women free-dealers,' approved April 15th, 1873. And your petitioner will ever pray, etc." The husband having filed his consent in writing, that his wife might be "declared a free-dealer," the chancellor, on the day the petition was filed, signed and caused to be filed a decree, which, omitting the caption, is as follows: "The petitioner, Mary E. King, a married woman, having presented her petition, praying to be made a free-dealer, and her husband, E. H. King, having filed his consent in writing hereto: It is ordered, adjudged and decreed that the said Mary E. King be, and she hereby is relieved from the disabilities of marriage, so far as to vest her with the right to buy, sell, hold and convey real and personal property, and sue and be sued as a *feme sole*, as provided by act approved April 15th, 1873." The bill, as amended, however, avers that, "upon the face of said proceedings, and of the decree therein rendered, the said decree is inoperative and void, as well as ineffectual to impart or sustain any validity in or to said deed, or in and to said mortgage, as to said lot" conveyed thereby.

RICE & WILEY, for appellant.

E. P. MORRISSETT, *contra*.

BRICKELL, C. J.—The material and, in fact, the only question raised upon the record is the validity of the decree of the court of chancery, rendered on the 10th of November, 1874, relieving the appellant from the disabilities of coverture (in the language of the decree), "so far as to vest her with the right to buy, sell, hold and convey real and personal property, and sue and be sued as a *feme sole*, as provided by act approved April 15th, 1873." The act referred to, and which constitutes



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the sole authority for the decree, and the proceedings upon which it is founded, in the first and only section which need be noticed, reads: "That the several courts of chancery of this State are hereby authorized and empowered to relieve all married women from the disabilities of coverture, so far as to invest them with the right to buy and sell, hold or convey real or personal property, and to sue and be sued as *femes sole*, in the following named cases: First, whenever the wife by her next friend shall file her petition in such chancery court, alleging her wish to become a *feme sole*, for the purpose and to the extent herein above stated, and the husband shall in writing consent thereto. Second, whenever the chancery court, upon such petition filed and proof taken, shall be of the opinion that the prayer of the petition should be granted." The statute contemplates two classes of cases in which the court should exercise the power or jurisdiction conferred; the first, when the consent in writing of the husband attended or accompanied the petition, rendering all proof unnecessary; the second, the rendition of the decree without or against the consent of the husband, if, upon proof taken, the court was of opinion the prayer of the petition should be granted. The presence or the absence of the consent in writing of the husband constitutes the distinction between the two classes of cases. In either class of cases, the indispensable element of jurisdiction is the petition of the wife, alleging her wish to become a *feme sole*, so far as the statute authorizes the court so to decree and declare her. The wife must be the actor; there is no power in the court to proceed against her *in invitum*, compelling her to a change of her legal *status*, and her petition must affirm or declare her wish, or her desire, or request, that the rights and benefits of the statute be extended to her. This element of jurisdiction must affirmatively appear on the face of the proceedings, or they will be *coram non judice*. It is not essential that the words of the statute should be strictly pursued, or that any particular words or phrases should be employed. A formal, technical allegation, as in a complaint or declaration in a court of law, or in a bill in equity, that it is the wish of the wife to be relieved of the disabilities of coverture, is not essential to the exercise of jurisdiction. The statement or affirmation in any terms, clearly importing her desire to avail herself of the statute, is sufficient. The existence of the wish is not a fact to be proved, nor is it a fact which can be drawn into controversy; the petition expressing it, in which the wife is the actor, is of itself conclusive, and, when the proceedings have ripened into a decree, which has been acted upon, and which is assailed collaterally, there can be no narrow interpretation of the words of the

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petition, nor a technical construction, measured by strict rules of pleading, of its several parts. The only questions which are then open, is the power of the court, or of fraud upon husband or wife. And if the petition admits equally of two constructions, that construction must be adopted, which will support, rather than that which will nullify the decree.—*King v. Kent*, 29 Ala. 542; *Wright v. Ware*, 50 Ala. 549.

The petition is brief, averring the residence of Mrs. King, her coverture, the name and citizenship of her husband, and that she was the owner of property, real and personal. Referring to the act of the General Assembly, the petition then proceeds to "ask and pray," that she be declared a free-dealer "with the right to buy and sell, hold and convey real or personal property, to sue and be sued as *feme sole*, as provided by an act of the General Assembly," etc. This is surely a substantial, if not a literal compliance with the requirements of the statute. *Asking and praying*, is certainly an expression of her wish, her desire, that she be relieved of the disabilities of coverture. There is no other sense in which these words can be taken and interpreted; to say that they were not the words employed in the statute is not an answer. The statute deals with things not words; with matters of substance, not with forms or formulas. That the prayer is, the wife may be declared a free-dealer, does not indicate that she sought the exercise of a power with which the court was not invested; the sense in which the term is used, the extent and purposes for which she wished to be made a free-dealer, is apparent from the subsequent words, and these are the words of the statute. The term "free-dealer," is rather peculiar to our statutes and decisions, and is always relative; its precise meaning and signification are derived from the statute to which it refers, the matter with which it is connected, or the subject to which it has relation. The syllabus, or abstract, appended to the section of the Code which authorizes chancellors to relieve married women of the disabilities of coverture, reads: "Court of chancery may declare married women free-dealers in term time or vacation." Yet, the term "free-dealer" is not employed in a general sense, as the equivalent of *feme sole*; it is employed in relation to the body of the section, and that clearly defines it. The same term, found in the written consent of the husband accompanying the petition of the wife, must be accepted in the same sense in which it is used in the petition, and, so taking it, as it was taken by the chancellor, and as it was intended it should be taken, it is the consent required by the statute. We are of opinion the decree is valid; that there was not a want of jurisdiction in the court to render it. And being valid, that it

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conferred upon Mrs. King capacity to execute the conveyance now impeached, is not denied.

Let the decree be affirmed.

## Gluck v. Cox.

### *Statutory Action for Recovery of Chattels in Specie.*

1. *Common law in Mississippi ; presumption as to.*—In the absence of proof to the contrary, this court will presume that the common law prevails in the State of Mississippi.

2. *Conveyance by husband to wife ; effect of at common law.*—At common law, the husband could not convey to his wife a legal title to any property. Such a conveyance, if executed and free from fraud, would, however, be upheld and protected in equity.

3. *Same ; when equitable not changed into legal title.*—Bringing personal property to which a married woman has only an equitable title, from Mississippi, where she acquired such title, into this State, does not change the status of the title.

4. *Same.*—The fact that one species of personal property to which a married woman had an equitable title, is changed into another, does not convert the equitable into a legal title.

5. *Detinue ; title to support.*—An equitable title will not support an action of detinue, or the statutory action for the recovery of chattels *in specie*.

APPEAL from Tuscaloosa Circuit Court.

Tried before Hon. S. H. SPROTT.

The facts are stated in the opinion.

McEACHIN & McEACHIN and WOOD & WOOD, for appellant.

J. M. MARTIN and W. G. COCHRANE, *contra*.

STONE, J.—The testimony most favorable to Mrs. Cox shows, that she intermarried with George W. Cox in 1865. At that time they resided in the State of Mississippi. It is not shown where they were married, but we suppose it was in Mississippi. Soon after their marriage, and while they were still residents of Mississippi, Cox made a voluntary gift to his wife of personal property of the value of six thousand dollars, which they soon afterwards sold, and converted into money. The money remained in Cox's hands. They afterwards removed to Texas, and again from Texas to Alabama. Cox used and converted to his own use some of his wife's money thus acquired, and afterwards repaid it to her. He then invested four thousand dollars of his wife's money in a mercantile part-



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nership in her name, and she became a member of the mercantile firm. She afterwards ceased to be a merchant, and the money, proceeds of her interest, was deposited in bank to her credit. Cox subsequently purchased thirty barrels of sugar, and paid for it with part of his wife's money, so deposited. The sugars were billed and shipped to him in the name of "George W. Cox, agent." Before the goods were removed from the depot of delivery, they were seized under executions against Cox, were sold, and Gluck, the appellant, became the purchaser. Before the sale, public proclamation was made, that Mrs. Cox claimed the goods. The present action, for the recovery of chattels *in specie*, was brought by Mrs. Cox, and she claims that the sugar is her property. Does she show a legal title in herself? If not, she can not maintain the action.

The present record contains no proof of the law of Mississippi; and that State being of common origin with the older States, we presume the common law prevails there.—1 Brick. Dig. 349, § 9; *McAnally v. O'Neal*, 56 Ala. 299; *Cahalan v. Monroe, Smaltz & Co.*, 70 Ala. 271.

At common law, the husband could not convey to his wife a legal title to any property. Such conveyance, if executed and free from fraud, would be upheld and protected in equity.

*Williams v. Maull*, 20 Ala. 721; Bish. on Married Women, § 838; *Shepard v. Shepard*, 7 Johns. Ch. 57; *McMillan v. Peacock*, 57 Ala. 127; *Helmetag v. Frank*, 61 Ala. 67; *Goodlett v. Hansell*, 66 Ala. 151; *Warren v. Jones*, 68 Ala. 449; *Cahalan v. Monroe*, 70 Ala. 271.

As this case now appears to us, when the gift was made by Cox to his wife, they being residents of Mississippi, she acquired but an equitable right. Bringing that property into this State afterwards could not change its status. Nor would the fact that one species of personal property was changed into another species of personal property, convert the equitable title into a legal one.—*Cahalan v. Monroe*, 70 Ala. 271. It would still retain the impress it received at its creation. This case is unlike *Castleman v. Jeffries*, 60 Ala. 380. Nor is there any evidence that the parties intended or attempted to convert the wife's claim into a statutory separate estate. It requires a legal title—a right to the immediate and unqualified possession—to maintain detinue.

It may not be out of place to call attention to the inquiry, if there should not be payment or tender of the freight charges, as a preliminary to the right of suit.

Many rulings of the circuit court are not reconcilable with this opinion.

Reversed and remanded.

## Matson v. Maupin & Co.

*Action on the Case for Personal Injuries inflicted by Defendants' Steer.*

1. *Action for personal injuries inflicted by domestic animal ; degree of care required of defendant.*—In an action for the recovery of damages for personal injuries sustained by plaintiff in being knocked down and run over by a steer chased or driven by defendants' servants along the streets of a city, a charge given at the defendants' request, instructing the jury that "if the defendants and their employees, in the management of the steer, exercised such care as men of ordinary prudence and caution would have exercised under similar circumstances, then the defendants are not responsible for the misfortune to plaintiff," lays down a correct rule as to the degree of care required of the defendants and their servants in such case.

2. *Same.*—Nor is such charge rendered subject to criticism by reason of the fact that it embodies the further proposition, that "for the convenience of mankind in carrying on the affairs of life people, as they go along public roads, must expect or put up with such mischief as reasonable care on the part of others can not avoid."

APPEAL from Mobile Circuit Court.

Tried before Hon. WM. E. CLARKE.

This was an action by Matthew Matson against R. L. Maupin & Co., in which the plaintiff sought to recover damages for personal injuries sustained by him in being run over and knocked down by a steer belonging to the defendants, while chased or driven through the streets of the Port of Mobile by defendants' servants. The cause was tried on the plea of not guilty, among others, the trial resulting in a verdict and judgment for the defendants. As the evidence tended to show, the defendants were engaged in selling stock and cattle sent to them upon commission, and had a stock-yard at the northern extremity of the city. The steer in question was sent to them the evening prior to the infliction of the injury complained of, and was placed in the stock-yard, where it remained until the next morning, exhibiting no vicious tendencies. When, on the morning of the accident, the cattle which had been sold were turned out of the stock-yard, the steer broke by defendants' servants placed on each side of the gate to guide the course of the cattle, and ran off, going through some of the principal streets of the city. Two of defendants' servants followed the steer on horseback, and while chasing and seeking to recover it, it ran against the plaintiff, knocking him down, and inflicting severe injuries. As the evidence tended to show, the steer

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was mad and dangerous, and that the servants, in following and chasing it, used the whip; and that, just prior to the injury, one of them whipped the steer in the face, and that it, attempting to gore the horse on which the servant was riding, dashed behind it, and upon the plaintiff. Whether the servants conducted themselves properly and with due care, in whipping the steer in the face, there was a conflict in the evidence. It was shown that the steer was running in a different direction from the one in which it was sought to drive it; and the testimony of most of the witnesses tended to show that "the usual way to turn a steer was to ride in front of it and whip it in the face;" while that of others tended to show that such treatment was wrong, and tended to infuriate the animal, and to make it dangerous,

The court charged the jury, at the defendants' written request, "that for the convenience of mankind in carrying on the affairs of life people, as they go along public roads, must expect or put up with such mischief as reasonable care on the part of others can not avoid; and that if the defendants and their employees, in the management of the steer, exercised such care as men of ordinary prudence and caution would have exercised under similar circumstances, then the defendants are not responsible for the misfortune to plaintiff." To this charge the plaintiff excepted, and it is here assigned, *inter alia*, as error.

J. L. & G. L. SMITH, for appellant.

R. H. CLARKE, *contra*.

SOMERVILLE, J.—The rule laid down by the court for the guidance of the jury was, in our judgment, correct as to the degree of care required of the defendants and their employees, in the act of driving or managing the steer, from which the plaintiff received his injury. This is stated to be "such care as men of ordinary prudence and caution would have exercised under *similar circumstances*."

We do not understand this instruction to attach any rigid and unelastic meaning to the phrase "ordinary prudence and caution," which is but a synonym for ordinary care. *Care* and *negligence* are terms entirely relative, varying in degree with every possible change of circumstances. It is manifest that "ordinary care" may mean very slight care in one state of circumstances, and comparatively very great care in another. One may drive a vehicle over a country road at a rapid rate of speed, and yet be free from every imputation of negligence, while, if he drive at the same rate through the streets of a populous city,



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he would be guilty of the grossest want of care. Yet, the measure of his legal duty in each case would be the exercise of ordinary care, graduated to suit the hazards of each changing exigency.—*Williams v. Richards*, 3 Carr. & K. 81. So, as aptly remarked in the argument of this cause at the bar, the ordinary care which is exacted from one person in the custody of a valuable jewel, is the same in legal principle, though different in degree, from the ordinary care required from another as the custodian of a grindstone. In the one case, it is the care usually taken by prudent custodians of jewels, and in the other that usually taken by prudent custodians of grindstones. In each case it is the care which the nature of the subject and the surrounding *circumstances* reasonably demand.—Cooley on Torts. 630 ; Shear. & Redf. Negl. § 7.

It is insisted that the court erred in not defining the degree of care required of the defendants, to be such care as men of ordinary prudence and caution *should* have exercised under similar circumstances. The words *should* and *would* each evidently import the same meaning in this connection, the best authorities using them interchangeably. The measure of care exacted is in accordance with what prudent and cautious men usually do in like circumstances, and upon failure to do which, they are no longer entitled to be called prudent and cautious. Hence, it may be said that they “would” or “would not” do something which the particular exigency required. Shear. & Redf. Negl. § 7; *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781.

The business of defendants was that of dealers in cattle, frequently involving the duty of driving and delivery. This was an ordinary business, as ancient perhaps as the oldest phases of commercial traffic. It required no extraordinary skill, and was properly carried on through the agency of employees, who could afford to pursue it only, perhaps, because unfitted for the higher and more profitable vocations of life. The principals could scarcely be chargeable with culpable negligence, so long as the agents continue to discharge the duties imposed upon them by the exercise of ordinary care—such as was usually exercised by prudent and cautious men engaged in the like business under like circumstances. The law would be unreasonable in its demands to exact more.

The accident in the present case was produced by an extraordinary and abnormal phase of the defendants’ business—one which the exercise of ordinary skill or foresight might not have anticipated. “No one is ordinarily guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances.” Shear. & Redf. Negl. § 6 ; *Blyth v. Birmingham Waterworks*

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*Co.*, *supra*; *Bizzell v. Booker*, 16 Barb. (Ark.) 308. It was said in a recent case, decided by the English Court of Exchequer, that "for the convenience of mankind, in carrying on the affairs of life, people, as they go along public roads, must expect, or put up with such mischief as reasonable care on the part of others can not avoid."—*Holmes v. Mather*, 16 Am. Rep. 384. This observation seems free from criticism, and appears to have been the authority suggesting the charge of the court given by request of defendants, to which exception is taken.

The charge of the court was correct, and the judgment is affirmed.

## Prickett & Maddox v. Sibert, Adm'r.

### *Bill in Equity to enforce Vendor's Lien.*

1. *When amendment to bill in equity properly allowed.*—To an original bill, filed by an assignee of a note given for unpaid balance of the purchase-money for land, for the purpose of enforcing a vendor's lien, alleging that the note was transferred by delivery merely, an amendment, striking out this allegation, and inserting in lieu thereof an averment, that the note was transferred by indorsement, is properly allowed.

2. *Declarations or admissions; when they operate as estoppels.*—Declarations or admissions, deliberately made, are conclusive upon the party making them, in all controversies involving their truth, between him and the person whose conduct he has knowingly influenced by them; and it is not of importance, whether the declaration or admission is made innocently or fraudulently, or whether, in point of fact, it is true or false; it is the fact, that another has been induced to act on it, and must suffer injury if its truth is gainsaid, that renders it conclusive.

3. *When recitals in note conclusive on maker.*—Where a recital is purposely embodied in a promissory note by the parties, to the effect that the note was given for the purchase-money of a designated tract of land sold and conveyed by the payee to the maker, in order that the payee might thereby be enabled to transfer the note in payment of a debt which he owed, and, on the faith of such recital, the creditor of the payee receives a transfer of the note in payment of his debt, the maker and those claiming the lands under him are thereby estopped from denying that the note was given for the purchase-money of the land.

4. *Enforcement of lien on lands which have been successively sold to different parties; rule as to.*—While it is a general rule, that, if lands subject to a vendor's lien or other incumbrance have been successively sold in different parcels to different persons, a court of equity, in decreeing a sale of the lands for the satisfaction of the lien or incumbrance, will pursue the inverse order of alienation, first, however, charging such of the lands as the vendee may retain, if he retains any, this is an equity of the purchasers, and must be claimed and asserted by them; and if not claimed and asserted, it is not obligatory upon the court, unless the rights of infants, or others not *sui juris* are involved, to mould its decree so that the equity will be enforced.

5. *When questions not made in primary court, not considered on ap-*

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*peal*.—The practice is well settled, that questions, not jurisdictional, which are not made in the primary court, will not be considered on appeal by this court.

6. *Judgment on note given for purchase-money of land ; evidence of the debt*.—Where a judgment at law is obtained on a promissory note given for the purchase-money of land, in stating an account of the amount due, on a bill filed to enforce a vendor's lien, interest should be computed on the judgment, and not on the note; the judgment being conclusive, as between the parties and their privies, that at the time of its rendition, the amount for which it was rendered was justly due from the defendant to the plaintiff.

APPEAL from Etowah Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on 2d September, 1879, and, as originally exhibited, it was a bill by O. W. Ward against W. P. Prickett, Rebecca Maddox, as the executrix of the last will and testament of J. W. Maddox, deceased, and C. B. Maddox and others, the heirs and devisees of said decedent, seeking to enforce a vendor's lien on land for an unpaid balance of purchase-money. It is averred, in substance, that on 26th October, 1872, one John P. Ralls sold and conveyed a designated tract of land in Etowah county to the said J. W. Maddox, partly for cash, and partly on a credit, and took from Maddox his three promissory notes for that part of the purchase-money which was not paid in cash, one of which was for \$1100, and payable to said Ralls or bearer on 25th December, 1872, "with interest from 25th December, 1871," and in which the consideration is recited; that "some time after the execution of the said notes, the said Ralls transferred, *by delivery*, in due course of trade, for a valuable consideration, the said note for \$1100 to Hollignsworth & Ward," by whom it was afterwards transferred to the complainant; that Ward brought suit on said note against J. W. Maddox, and, on 27th March, 1874, recovered a judgment thereon for \$1493.13, on which payments were afterwards made as follows: \$800 on 28th October, 1874, and \$150 on 11th May, 1877; that, in May, 1876, said Maddox died, leaving a last will and testament, which was duly admitted to probate, and by which devises of portions of the lands purchased from Ralls were made to some of his children; that prior to his death, in 1874, said Maddox sold and conveyed to said Prickett another part of said lands, as to which the complainant released his lien as vendor; that on the probate of the will, Rebecca Maddox was appointed executrix, and afterwards she sold two other parcels of said lands, one to said Prickett and C. B. Maddox, and the other to C. B. Maddox alone, neither of which had been paid for, and no deed thereto had been executed; and that the other two notes given by said testator to Ralls had been fully paid. Said Ward having died



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after the filing of the bill, the cause was revived in the name of W. J. Sibert, as the administrator of his estate.

Decrees *pro confesso* were taken against all the defendants except W. P. Prickett and C. B. Maddox, who, a demurrer interposed by them to the bill having been overruled, filed a joint answer. In their answer they deny the allegations of the bill touching the sale made by Ralls to Maddox, and aver that said lands were purchased at two different times, under two separate and distinct contracts, one made in September, 1870, and the other, on 26th October, 1872, although they were conveyed in one deed; that the part of the lands covered by the first purchase, including, it seems, the land purchased by said defendants from said executrix, or a portion thereof, had been fully paid for; and that, in substance, if the note transferred to Ward was given for the purchase-money of any of the lands described in the bill, it was given for the purchase-money of the lands embraced in the second purchase. The lands embraced in each purchase are particularly described, and averments are made purporting to give the details of the transactions. It is also denied that the complainant has a lien on any of said lands for the payment of said judgment, or the note merged therein.

As the evidence tended to show, John P. Ralls sold to J. W. Maddox part of said lands in the latter part of the year 1870, and the balance thereof, in the summer or fall of 1871; and, on 26th October, 1872, he executed a deed conveying to said Maddox all of said lands. At the time of the second sale, there was still unpaid on the lands first sold the sum of \$1100. John P. Ralls, the only witness examined in the cause, testified that the note was transferred by him to Hollingsworth & Ward by delivery merely, and without indorsement. The other facts disclosed by the evidence, touching the execution and transfer of said note, are sufficiently stated in the opinion.

At the August term, 1881, of said court, on a submission of the cause on pleadings and proof, a decree was entered granting the complainant relief. From that decree an appeal was prosecuted by the defendants to this court; and on that appeal, the decree then rendered was reversed and the cause remanded. See *Prickett & Maddox v. Sibert, Admr.*, 71 Ala. 194. After the remandment of the cause, the complainant was allowed to amend the bill, against the defendants' objection, by striking out the averment, that the note was transferred by delivery, and by inserting in lieu thereof an averment, that the note was transferred by indorsement. On the application to amend, it was shown that, when the original bill was filed, and Ralls was examined as a witness, the note was mislaid, but that it had since been found, and on it was the indorsement of Ralls.

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To the bill, as amended, the defendants demurred; but their demurrer was overruled. The cause was then submitted for final decree on pleadings and proof, and on agreement of counsel. In the agreement was an admission, that Ralls transferred the note to Hollingsworth & Ward by indorsement. On this submission, the chancellor caused a decree to be entered, ascertaining and decreeing the amount due the complainant to be \$1167.09, declaring a lien on all the lands described in the bill for the payment of said amount, and ordering said lands sold in satisfaction of such lien, after a designated time allowed the defendants, in which they might pay the amount decreed against them.

The errors here assigned are based on the rulings of the chancery court in allowing the last amendment to the bill, in overruling the demurrer to the bill as amended, and on the final decree.

DENSON & DISQUE and WATTS & SON, for appellants.

AIKEN & MARTIN, *contra*.

BRICKELL, C. J.—1. There was no error in allowing the amendment of the original bill, by striking out the allegation, that the note was by the payee transferred by delivery, and the insertion of an allegation, corresponding to the facts, that it was transferred by indorsement in writing, involving the payee and maker in liability for its ultimate payment. Whether the original bill contained equity; whether it presented a case of which the court could take cognizance, entitling the complainant to relief, is not a material inquiry. If it did not, supplying or correcting its deficiencies was the proper office of an amendment. As has been often decided, the amendment of bills, correcting errors of omission or commission, is matter of right, co-extensive with the error, unless an entirely new case is made, or there is a radical departure from the cause of action stated in the original bill, or unless it is proposed to work an entire change of parties, plaintiff or defendant.—*King v. Avery*, 37 Ala. 169; *Moore v. Alvis*, 54 Ala. 356; *Pitts v. Powledge*, 56 Ala. 147.

2. Whether there were two sales of lands, and whether the note was given for the purchase-money of the lands, the subject of the first or of the second sale, is not now matter open for contestation, or which, whatever may have been the actual fact, can affect the rights of the parties. The note was given with full knowledge by the maker, that the purpose of the payee was its transfer to Hollingsworth & Ward. It was made for the precise amount that the payee was owing them, and to

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enable him to transfer it in payment of the debt. The maker also knew that the inducement moving them to accept the transfer was the representation, that the consideration of the note was the purchase-money of the entire tract or body of lands, bound by the lien of the vendor for its payment. In assurance of the fact, and of the truth of the representation, on its face the note recites, as its consideration, the purchase of the lands, and the conveyance of them by deed of even date with it. If before accepting the transfer, Hollingsworth & Ward, informing the maker that they were negotiating it, had inquired of him as to the consideration of the note, and he had made the statements which are embodied upon its face, there would be no doubt that he could not subsequently deny or contradict them, in a controversy with the transferees, or their privies, claiming to enforce a lien on the lands for its payment. Declarations or admissions, deliberately made, are conclusive upon the parties making them, in all controversies involving their truth between him and the person whose conduct he may knowingly influence by them. It is not of importance, whether the declaration or admission is made innocently or fraudulently; whether in point of fact it is true or false; it is the fact, that another has been induced to act on it, and must suffer injury if its truth is gainsaid, that renders it conclusive.—1 Brick. Dig. 796, § 10. That the note was made the medium of communicating the assestion or representation of the fact and character of its consideration, can not vary the application of this principle. The representation was made in that form, not only that of it there should be permanent evidence, but also for the purpose of communicating it to the transferees, and to induce them to accept the transfer. It is of the same conclusive force that it would have been if communicated directly in answer to an inquiry by them, made before accepting the transfer.

3. The general rule is indisputable, that if lands are subject to mortgage, or to the lien of the vendor for the payment of the purchase-money, or to other paramount incumbrance, and are sold successively in different parcels to different persons, a court of equity, in decreeing a sale of them for the satisfaction of the mortgage, or the lien of the vendor, or in charging them with the incumbrance, will pursue the inverse order of alienation, first, however, charging such of the lands as the vendee may retain, if he retains a part or parcel.—*Cullum v. Erwin*, 4 Ala. 452; *P. & M. Bank v. Dundas*, 10 Ala. 661; *Mobile Marine Dock & Mut. Ins. Co. v. Huder*, 35 Ala. 713. This is an equity of the several purchasers, and must be claimed and asserted by them. If not claimed and asserted, it is not obligatory upon the court, unless the rights of infants, or others not *sui juris* are involved, to mould its decrees so that the equity



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will be enforced. It may be, the court should have ordered a sale of the lands devised, which are in possession of the devisee, in satisfaction of the decree, before resort was had to the lands which had been sold, or with which the deceased vendee had parted in his life. But this was not claimed by the answers, nor was it otherwise asserted or drawn to the attention and consideration of the court. The answer of an adult defendant must put in issue all the facts upon which he relies in bar of the relief claimed, and of evidence outside of, or extrinsic to the issues, the court will not take notice, and can not make it the basis of a decree.

4. The release by Ward of the lien on a part of the lands is not a fact upon which any of the parties relied in the court of chancery, as a *pro tanto* exoneration of the lands claimed by them; and its effect can not now be inquired into, without the risk of injustice to him. The practice is well settled, that questions, not jurisdictional, which are not made in the primary court, will not be considered in an appellate court.—1 Brick. Dig. 776, § 31. See *Watts v. Burnett*, 36 Ala. 340.

5. The judgment at law against the vendee on the note is conclusive of the rights of the parties—conclusive that, at the time of its rendition, the amount for which it was rendered was justly due from the defendant to the plaintiff.—*Bobe v. Stickney*, 36 Ala. 482. An unqualified transfer or assignment of the judgment would in equity have operated as a transfer of the lien on the land, and the assignee could have subjected the land to the payment of the judgment.—*Griffin v. Camack*, 36 Ala. 695; *Kelly v. Payne*, 18 Ala. 371. The note was merged, its existence was lost in the judgment, which, for most purposes, became the only, as it is the final and conclusive, evidence of the debt.—*Cook v. Parham*, 63 Ala. 456. Judgments, like other debts, if payment of them is forborne or delayed, bear interest.—*Ijams v. Rice*, 17 Ala. 404. The chancellor did not err in accepting the judgment as the evidence of the debt, and in the computation of interest upon the principal sum for which it was rendered, instead of going behind it, re-opening it, and computing interest upon the note.

We have examined the assignments of error, without finding any cause of reversal, and the decree must be affirmed.

[Kirkland v. Trott.]

**Kirkland v. Trott.***Motion for Rents accruing after Judgment in Real Action.*

1. *Motion for rents accruing after judgment in real action; statute of limitations.*—A motion under the statute by the plaintiff in a real action for rents accruing after judgment, and before delivery of possession (Code, § 2958), is a substitute for an action for mesne profits, is in the nature of a suit for use and occupation, or for arrears of rent, and belongs to the class of actions which are barred by the statute of limitations of six years (Code, § 3226).

2. *Same; liability of tenants in common for use and occupation.* Where one tenant in common forcibly evicts another, or the one in possession keeps the other out, or refuses to let him enter, this constitutes an *ouster* which will support ejectment; and in such action, the plaintiff may recover his share of the value of the use and occupation wrongfully withheld from him.

3. *Same; tenants in common; res adjudicata.*—On a motion under the statute by the plaintiff in ejectment for rents accruing after judgment, in a case where the parties are tenants in common, the recovery in ejectment is a conclusive adjudication against the defendant, that he had ousted the plaintiff.

4. *Same; effect of appeal from recovery in ejectment, and of supersedeas, where parties are tenants in common.*—Where one tenant in common obtained a judgment of recovery in ejectment against his co-tenant, from which the latter appealed to this court, and executed a bond for the purpose of superseding the judgment, on a motion made by the plaintiff for rents accruing after judgment, on an affirmance in this court, the defendant can not be heard to say, that the bond did not operate as a *supersedeas*, and, for this reason, the plaintiff was not prevented from entering by the appeal. The bond, in such case, furnished a sufficient excuse to the plaintiff for not attempting to take possession pending the appeal.

5. *Same; admissibility of evidence.*—In such case, the bond and other proceedings on the appeal are admissible in evidence against the defendant, although they are not averred in the motion, or otherwise pleaded.

6. *Same; lis pendens notice to defendant's vendee.*—*Lis pendens* operating as notice, the transfer by the defendant, pending the appeal, of his possession, and of all his right and title to a third party, does not, in such case, affect the plaintiff's right of recovery.

APPEAL from Sumter Circuit Court.

Tried before Hon. JOHN MOORE.

This was a motion under the statute by David H. Trott for rents of an undivided half interest in a designated lot of land in the town of Livingston, which he had, on 16th October, 1877, recovered in an action of ejectment brought by him against David L. Kirkland; and was filed on 2nd December, 1882. The defendant filed the following pleas: 1. "The general issue." 2. The statute of limitations of one year.

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3. That at the time of plaintiff's recovery, plaintiff and defendant were tenants in common, each having an equal interest, and continued to be tenants in common until 15th December, 1878, when the defendant sold and conveyed his interest in the premises to one Louisa Battle, and "transferred to said Battle his possession of said premises;" and that since 1st January, 1879, he has not had possession of said property, or claimed any right, title or interest therein, or in any manner asserted any authority or control over the premises, or received any rents therefrom. 4. The facts pleaded in the third plea, *supra*, in defense of so much of the motion as seeks a recovery of rents after 15th December, 1878. 5. That the defendant was, at the time of the rendition of the judgment for the land, a tenant in common with the plaintiff, owning an undivided half interest in the land; and that he had since continued to hold and own said undivided half interest, and to be a tenant in common with the plaintiff. The plaintiff demurred to each plea was sustained. The motion was then tried on issue joined on the plea of the general issue, the trial resulting in a verdict and judgment for the plaintiff.

The plaintiff proved, on the trial, the rendition of his judgment, and that on 14th January, 1878, the defendant applied for, and obtained an appeal from said judgment to this court, he executing a bond for the purpose of superseding the judgment, which recites the application for the appeal, "and also for a *supersedeas* of the execution of said judgment, which has been granted on his entering into this bond;" that said judgment was affirmed on 19th July, 1881, and that on 1st October, 1881, the plaintiff was put in possession of the land by the sheriff of Sumter county, under a writ of possession. "The defendant objected to the evidence in regard to the appeal, and the affirmance of the judgment, because there was no corresponding averment in the motion, and because the evidence was irrelevant." The court overruled the objection, and the defendant excepted. The plaintiff also proved the rental value of the lands from 16th October, 1877, until the writ of possession was executed.

"The defendant objected to being charged with more than half the rents he had received during the time sued for, and offered to prove that, at the time of the recovery of said judgment in said real action, and ever since, he was the owner in fee of an undivided half interest in the land, in common with the plaintiff, who owned the other half interest therein; that he was in possession of said land by virtue of such ownership; and that since the recovery of said judgment in said real action, plaintiff never demanded possession of said land. Defendant



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also offered to prove what amounts he had received, during the years sued for, for the rent of said land. The court refused to admit the evidence thus offered, and decided that the defendant was liable to the plaintiff for the fair market rental value of the land, without regard to what he had received, except as a circumstance tending to show what that value was; and the defendant then and there excepted to the ruling of the court. While plaintiff was being examined, he was asked what was the fair market rental value of the land; to which defendant objected, on the ground that, being a tenant in common with plaintiff, he was not liable for more rents than he had received."

The rulings above noted are here assigned as error.

J. B. HEAD and J. J. ALTMAN, for appellant.

THOS. B. WETMORE, *contra*.

STONE, J.—We can not agree with appellant that section 3231, sub-division 6, of the Code of 1876, fixes the limitation of this action. It is a substitute for an action for mesne profits, is in the nature of a suit for use and occupation, or for arrears of rent, is authorized by the statute, and, we think, it falls within section 3226 of the Code. To hold that it is a civil action for an "injury to the rights of another," is certainly a very indefinite, if not an inaccurate definition. All the analogies assign it a place under section 3226 of the Code.

In ordinary cases, one tenant in common is not liable to his co-tenant for use and occupation. This results from the fact that such tenant, when in possession, is only in the exercise of the rights the law and his title clothe him with. He is in possession, has the right to be in possession, and such possession does not, *per se*, dispossess the other co-tenant, nor deny to him the equal right to enter and occupy. The mere possession of one tenant in common is not adverse to the claim or right of his co-tenant, but is presumed to be taken and held under the common title, in recognition of the common right, for the benefit of all the tenants in common, and not in hostility to such common right. Such peaceable possession, being in recognition of the equal rights of the other tenants, has in it none of the elements of an adverse holding. In cases of this kind, the tenant out of possession can recover nothing for mere use and occupation against the tenant in possession, although the latter may have occupied and utilized the entire premises. This, because in presumption of law, it was the mere neglect or fault of the tenant out of possession, that he did not enter and occupy with his co-tenant. If, however, the tenant in possession actually realize rents for the premises, or a part of

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them, he can be made to account to his co-tenant for his share of such receipts.—*Newbold v. Smart*, 67 Ala. 326; *Terrell v. Cunningham*, 70 Ala. 100.

When there has been a forcible eviction of one tenant in common by another, or the one in possession keeps the other out, or refuses to let him enter, then the case is governed by different rules. Then, and only then, can the tenant out of possession maintain an action to be let in; for only in such case has he been evicted. This constitutes the *ouster*, indispensable to the maintenance of ejectment. And in such action, the plaintiff may recover his share of the value of the use and occupation, which has been wrongfully withheld from him.

It is contended for appellant, that this rule should not apply to this case, first, because it is not shown that Trott, the plaintiff, was hindered from occupying the premises under his title. This is answered by the recovery of Trott v. Kirkland, in the statutory real action. If there had been no hindrance to Trott's entry, that action could not have been maintained. The recovery and judgment in that suit render this question *res adjudicata*, between these parties.

It is contended, in the second place, that after the recovery in the circuit court, Trott could have entered, and therefore he should not recover in this proceeding. The answer to this objection is, that Kirkland all the while litigated Trott's right to enter; and after verdict and judgment in the circuit court, he appealed to this court, and superseded the judgment in the circuit court. After the affirmance in this court, Trott was guilty of no undue delay in obtaining possession.—*Kirkland v. Trott*, 66 Ala. 417. It does not lie in Kirkland's mouth to say the supersedeas bond was insufficient. It was intended to operate as a supersedeas, expresses that it does supersede the judgment, and Kirkland can not complain that Trott submitted to it, without testing its sufficiency. It furnishes a sufficient excuse to Trott for not attempting to take possession, which we feel bound to presume would have been resisted. Nor was there any error in receiving evidence of the bond, and other proceedings on the appeal. They were but evidence showing how Trott was kept out of possession, and it was not necessary to plead them.

The transfer by Kirkland, made pending the appeal, of his possession, and all the right and title he had, to another, can cut no figure in this trial. *Lis pendens* was notice to his vendee, and she was as much concluded by the judgment as he was; and the writ of possession was as potent against her, as against him.—*Peevey v. Cubaniss*, 70 Ala. 253. Her possession, derived from him, was as much a wrongful keeping of Trott

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out of possession, as if he had remained in possession himself, or had placed a tenant there to hold for him. Affected with notice, as Mrs. Battle was, she acquired no greater rights or immunities than her vendor had.

Affirmed.

## Jarratt v. McCabe.

### *Action against Mortgagee for Statutory Penalty for Failure to enter of Record Satisfaction of Mortgage.*

1. *Penalty for failure to enter of record satisfaction of mortgage ; statute strictly construed.*—The statute providing a penalty against a mortgagee for failure to enter of record satisfaction of the mortgage within three months after payment of the mortgage debt, and after request in writing to make such entry (Code, §§ 2222-23 ; Pamph. Acts, 1880-1, p. 32), being penal in its nature, must be strictly construed, and can not be extended by implication.

2. *Same ; when request insufficient.*—Where there are two mortgagors, a written request signed by one of them, in his own name, is not a compliance with the statute providing such penalty, although it was made with the knowledge and concurrence of the other.

APPEAL from Lawrence Circuit Court.

Tried before Hon. H. C. SPEAKE.

The facts are sufficiently stated in the opinion.

J. H. BRANCH, JAMES JACKSON and J. C. KUMPE, for appellant. (1) The *request* required by the statute is not unlike the common law notice to quit by a landlord, which was sufficient if signed by one only, though several were interested in the premises jointly.—Bou. Law Dic., title, Notice to Quit. The notice by Scott was within the spirit and letter of the statute. (2) The mortgagor who did sign and deliver the request, was presumably acting for himself and co-obligor, who wrote the body of the notice, and was present when it was delivered. If the defendant did not question his authority at the time it was delivered, he can not do so now. See *Bell v. Wilkinson*, 65 Ala. 477. (3) It has been said that this is a penal statute and should be strictly construed ; yet, the *letter* yielded to the *spirit* of the law in *Bell v. Wilkinson*, *supra*, where notice *by attorney* was held sufficient ; and also in *Renfro v. Adams*, 62 Ala. 302, where notice to *one of several partners* was held sufficient.

W. P. CHITWOOD, with whom were R. O. PICKETT and D.



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W. SPEAKE, *contra*.—(1) The statute under consideration is highly penal, and must be strictly construed.—*Grooms v. Han-non*, 59 Ala. 510. (2) In this case, there being two mortgagors, a suit for the statutory penalty could only have been maintained in the name of both.—*Harris v. Swanson*, 62 Ala. 299. It seems to follow, therefore, that the written request required by the statute should have been in the name of both mortgagors. (3) It is true that it has been decided that notice or request to one member of a partnership is good against the firm; but this results from the unity of the partnership. "Each member represents, not himself, but the partnership in its entirety or personality."—*Renfro & Andrews v. Adams*, 62 Ala. 302; *N. Y. & Ala. Con. Co. v. Selma Savings Bank*, 51 Ala. 305.

SOMERVILLE, J.—The action is for a penalty of two hundred dollars, based upon the alleged failure of the defendant, as mortgagee, to enter satisfaction of a mortgage upon the margin of the record, within three months after payment of the mortgage debt, and after request to make such entry in accordance with the provisions of the act of March 1st, 1881, amendatory of sections 2222 and 2223 of the Code of 1876. Acts 1880–81, p. 32; Acts 1878–79, p. 70. The statute requires that such request should be made by the mortgagor, and that it must be made in writing. There were two mortgagors in the present case, Jarratt and Scott, only one of whom made the requisite statutory request, but both of whom unite as co-plaintiffs in the action. The question raised for decision is, whether a written request signed by one of the mortgagors, in his own name, but with the knowledge and concurrence of the other, is a sufficient compliance with the statute.

The statute giving the penalty is obviously penal in its nature, and must be strictly construed. It can not be extended by implication. The request to enter satisfaction must, for this reason, be made by all the interested parties—by both of the mortgagors, and not by one of them alone in his own name. This is the letter of the statute, and comports also with its policy and its spirit. The right to sue for the penalty is a joint one, given to both of the mortgagors, who are required to join in an action for its recovery. It could not be brought in the name of either alone. Nor would one be entitled to judgment for his moiety, if his co-plaintiff should fail.—*Harris v. Swanson & Bro.*, 62 Ala. 299. No one could be regarded as a "party aggrieved" within the meaning of the statute, unless he had himself made the request, and there had been an unlawful neglect of the mortgagee to comply with it. It is clear that a verbal request, or one made before payment or satisfaction of the mortgage, would avail nothing. It must be in writing, and

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in the name of all the parties who are interested in the recovery of the penalty.

This is in harmony with the rule as to notices to quit from landlords to tenants. The sounder view in such cases is, that if the demise be by three, notice by two will be insufficient to lay the foundation for summary proceedings to eject the tenant from the premises. All are required to join in such a notice in order that it may be binding upon the party notified, as to the entire interest represented by the opposite parties. Wade on Notice, § 616-618; 1 Wash. Real Est. (4th Ed.) 606, \* 386. The reasons are far more forcible why the same rule should prevail in cases belonging to the class like that now under consideration. The case of *Bell v. Wilkinson*, 65 Ala. 477, in no wise conflicts with the foregoing view. It was there held that a request made by an authorized agent, or attorney, in the name of the mortgagor, was sufficient. So the principle declared in *Renfro v. Adams*, 62 Ala. 302, holding sufficient a request to one of several members of an existing partnership, rests upon the rule that each partner is an agent for the others as to all matters within the scope of the partnership business, and notice to one is notice to all.

The evidence in the present case does not show a written notice or request in the name of both of the plaintiffs, but only in the name of one them. This was insufficient to authorize a recovery, and the court correctly so charged the jury.

Judgment affirmed.

## McDaniel v. Callan.

*Bill in Equity to restrain Lessee in Possession from Commission of Waste, and a Violation of Covenants of Lease.*

1. *Injunction against waste by tenant in possession; what necessary to relief.*—While a court of equity has, and will fully exercise its preventive jurisdiction, by injunction, to protect the reversion against waste by the tenant in possession, it will not interfere, unless it is shown that a positive injury to the premises, repugnant to the terms of the lease, or a positive misuse of the premises, or their conversion to uses unauthorized, is contemplated and reasonably apprehended.

2. *Same.*—Hence, where, by the terms of the lease, the tenant is not only expressly authorized, but is required, as one of the considerations moving the landlord in its execution, to reduce to cultivation during the term uncleared portions of the demised premises, a court of equity will not intervene by injunction to restrain him from cutting down timber on the lands, for the purpose authorized by the lease.

3. *When covenant in a lease runs with the land.*—A reservation in a

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lease of lands which are largely, if not wholly uncleared and unimproved, to the lessee, of the right to the use and occupation, for a designated period, of such parts of the premises as he may reduce to cultivation, or clear during the term, like a covenant for quiet enjoyment, or a covenant to cultivate the land in a particular manner, or a covenant for the renewal of the lease, runs with the land, and is binding upon the assignee of the reversion.

4. *Lease; special provision for its termination construed.*—Under a stipulation in such lease that, in the event of a sale of the demised premises by the lessor during the term, the lessee should surrender the possession on “being paid a reasonable valuation for the unexpired term,” a mere sale and conveyance of the premises by the lessor do not operate a determination of the lease; but the stipulation merely reserves to the purchaser, or the assignee of the reversion, the privilege or option of determining the lease, upon a performance of the condition expressed—the payment or tender to the lessee of the reasonable value of the unexpired term; and, until such payment or tender is made, the lessee has the right to the unmolested use and enjoyment of the premises, and the right to continue the clearing, or reduction to cultivation, of the lands, according to the terms of the lease.

5. *Cross-bill; when properly dismissed.*—A cross-bill not seeking a discovery, and making no defense which is not equally available by answer, should be dismissed; hence, it was held that the decree dismissing the cross-bill filed in this cause was free from error.

#### APPEAL from Cherokee Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on 5th December, 1878, by A. J. Callan and P. A. Callan against Fleming McDaniel, to restrain the defendant, who was in the possession of certain lands, as the lessee of one Milly Smith, from the commission of waste, and from a violation of the covenants of the lease, which was executed on 9th April, 1878, and is made an exhibit to the bill. The complainants claim by purchase from the lessor, made on 14th November, 1878, she executing to them a bond for title. By amendment the said Smith was made a party defendant to the bill. Both defendants answered, and McDaniel prayed that his answer might be taken and considered as a cross-bill, and that, upon final hearing, he be decreed compensation for the value of the unexpired term of the lease. The material provisions of the lease and the other facts disclosed by the record, necessary to an understanding of the points decided, are sufficiently stated in the opinion. The lease will also be found copied at length in the report of the case of *Callan v. McDaniel*, 72 Ala. 96.

On the hearing, had on pleadings and proof, a decree was entered granting relief to the complainants in the original bill, and dismissing the cross-bill; and that decree is here made the basis of the assignments of error.

McSPADDEN, CARDON & BENNETT, for appellant.

WALDEN & SON, *contra*.

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BRICKELL, C. J.—The bill is filed by assignees of the reversion to restrain the lessee in possession from the commission of waste, and from a violation of the covenants of the lease. The preventive jurisdiction of a court of equity, through the aid of an injunction, is freely exercised to protect the reversion against waste by the tenant in possession, whether the waste may consist in an actual abuse of, or injury to the premises, or in their misuse, or in their conversion to uses prohibited by, or repugnant to the terms of the lease.—1 High on Injunctions, § 434; *Parkman v. Aicardi*, 34 Ala. 393. The court will also intervene for the protection of the lessor, or of the lessee, in a proper case, against a violation of the express or implied covenants of the lease, thus in effect enforcing specific performance of the contract.—2 High on Injunctions, §§ 1141 *et seq.* But in neither case will the court interfere upon slight or uncertain grounds. Waste, a positive injury to the premises, repugnant to the terms of the lease, or a positive misuse of the premises, or their conversion to uses unauthorized, must be shown to be contemplated and reasonably apprehended, or the court will abstain from interference by injunction. And a breach of the covenants of the lease, intended and about being committed, must be made to appear, if preventive aid is sought, compelling a specific performance of the contract. In neither case will the court interfere for the redress of past injuries, or of past breaches of contract. Compensation in damages, through the medium of an action at law, is the appropriate remedy for waste committed, or for covenants broken, or contracts violated. In such cases, an injunction can not afford relief; it prevents wrongs or injuries which are threatened, for which, if done, the remedy at law is inadequate.

The lease was of premises largely, if not wholly, unimproved, and its continuance was for the term of three years. The consideration moving the lessor in its execution, and the benefit resulting to her was not the payment of pecuniary rent, or of rent in any form. The construction by the lessee of the improvements designated, and the reduction to cultivation during the term of uncleared parts of the premises, is the consideration he was to yield. The first year of the term he was, if practicable, to clear twenty acres, and it was stipulated he should have the use thereof for three years, or for the making of three crops; and there was a like stipulation as to such parts of the premises as he should clear during the succeeding years of the term. The lease thus, in effect, provides for its own continuance as to parts of the premises for a longer term than that which is specified; and the provision was inserted manifestly for the purpose of inducing and encouraging the lessee to the clearing and fitting for cultivation of as large

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portions of the premises as was practicable. It was inserted for the mutual benefit of lessor and lessee. But in the event of a sale of the premises by the lessor during the continuance of the lease, the lessee stipulated to surrender possession, "by being paid a reasonable valuation for the unexpired term of said lease," with an exception that he should not be required to surrender possession in the spring of the year, after having made arrangements for a crop.

In a case between these parties at a former term, we held the reservation to the lessee of the right to the use and occupation, for three years, of such parts of the premises as he reduced to cultivation, or, in the words of the lease, *cleared*, like a covenant for quiet enjoyment, or a covenant to cultivate the land in a particular manner, or a covenant for the renewal of the lease, runs with the land, and is binding upon the assignee of the reversion.—*Callan v. McDaniel*, 72 Ala. 96. It is quite a mistake to suppose, as seems to be the theory of the appellees, that a mere sale and conveyance of the lands by the lessor operated a determination of the lease. The purchaser or assignee of the reversion had the privilege or option of determining it, but it was a bare privilege or option that he could exercise or not at his discretion. And he could exercise it only upon the performance of the condition expressed—the payment to the lessee of the reasonable value of the unexpired term. Without such payment, or the tender of it, the lease, with all its covenants and stipulations, remained in full force. The lessee, after such sale and conveyance, until such payment or tender, had the right to the unmolested use and enjoyment of the premises, and the right to continue the clearing or reduction to cultivation of the lands, according to the terms of the lease; and he was bound to the same duties and obligations which rested upon him before the sale and conveyance was made.

We shall not notice specially the averments of the bill; it is not clear to us that they impute waste to the lessee. But if such is their effect, the evidence is clear that it had not been committed, nor was it threatened. Waste is the abuse or misuse, or the spoil or destruction of premises by one having possession and the right of legitimate use, and yet has only a qualified or limited title or interest. The use of premises for the purposes specified in the lease, or the destruction of things attached to the realty in accordance with its terms, can not be imputed as waste. The element of wrong is wanting. All that appears from the evidence is, that the lessee, after the sale and conveyance, and after he had notice of it, continued the clearing of the lands, not destroying any other timber, or timber in any other manner, than was necessary for that purpose.

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There was no offer or tender to him of payment of the value of the unexpired lease, until after the filing of this bill, and the sum then tendered is not shown to be the equivalent of its value; on the contrary, the weight of the evidence is, that it was not a fair equivalent. A court of equity will not interfere against a lessee in possession, using and enjoying the premises in accordance with the terms of the lease, working no spoil or destruction to the reversion, or, if it be spoil or destruction, only that which was contemplated and is authorized.

A cross-bill is, in its very nature, a mode of defense; its purpose is either to obtain a discovery in aid of the defense to the original bill, or to obtain full relief touching the matters of the original bill, or to set up some matter which has arisen after the cause was at issue. A cross-bill not seeking a discovery, and making no defense which was not equally available by answer, should be dismissed.—Story Eq. Pl. §§ 387, 383; *Braman v. Wilkinson*, 3 Barb. Ch. 151. The relief claimed by the cross-bill is compensation for the value of the unexpired term of the lease. The original bill, as amended, contains an express offer to pay the value of the unexpired term; and the offer clothed the court with jurisdiction to render a decree compelling the complainants to its payment, if there could have been a decree rendered in their favor.—*Br. Bank Mobile v. Strother*, 15 Ala. 51; *Mooney v. Walter*, 69 Ala. 75. Acting upon its own extensive and beneficial maxim, that he who seeks equity must do equity, the court would not, under the circumstances of the case, have intervened for the relief of the complainants, without imposing, as a condition, that they should observe the terms of the lease, and, if they would determine it, should pay the value of the unexpired term. The court refuses its aid to a party coming in for relief upon a legal right, because of the inadequacy of legal remedies, unless he complies with such conditions as, in the nature of the case, are just and equitable.—1 Story's Eq. § 64a.

The decree of the chancellor upon the original bill must be reversed; and a decree will be here rendered dissolving the injunction and dismissing the bill at the costs of the complainants therein, to be taxed by the register. The decree dismissing the cross-bill must be affirmed; and the costs thereof must be paid by the complainant therein, to be taxed by the register. The costs of the appeal in this court and in the court of chancery must be paid by the appellees, A. J. Callan and P. A. Callan.



## Kahn, Wolf & Sons v. Locke.

### *Motion to retax Costs.*

1. *Fees or commissions for services rendered by ministerial officers ; rule regulating.*—For services rendered by ministerial officers, when the law fixes and defines the fees or commissions, the officer shall receive no other or greater compensation than the law declares, although particular circumstances may render such compensation inadequate in the particular case.

2. *Sheriff's fees for collecting money under process ; what service covered by.*—The commissions allowed a sheriff by statute for collecting money on a *fiery facias* include compensation for all the acts of levy and sale required to effect the collection, and are the same whether he receives the money from the defendant on demand, or whether he is put to the trouble of levying and selling, in order to "make the money;" and the rule of commissions in attachment suits is the same, with the exception that a small fee is allowed for making the levy; hence, no extra compensation can be allowed for clerk-hire, or making the return.

3. *Allowance for removal of, and guard over goods levied on ; when proper.*—When a stock of merchandise is levied on under an attachment or execution, and it becomes necessary to remove it, and to employ a guard or watchman, for its preservation, these services justify a special, reasonable allowance to the sheriff, to be paid out of the proceeds of sale.

### APPEAL from Hale Circuit Court.

Tried before Hon. JOHN MOORE.

On the 4th April, 1881, Bamberger, Bloom & Co., Woodruff & North and Kahn, Wolf & Sons sued out attachments against A. S. Jeffries, which were levied by James W. Locke, the sheriff of Hale county, on a stock of goods belonging to Jeffries. These goods, excepting a part claimed by the defendant in attachment as exempt, were, under an order of court, sold by the sheriff, and the proceeds of sale paid over to the plaintiffs in the attachments, thereby satisfying in full judgments rendered in favor of Bamberger, Bloom & Co. and Woodruff & North, but leaving a considerable balance unpaid on the judgment in favor of Kahn, Wolf & Sons. The proceeds of sale amounted to \$3753.79, from which the sheriff retained the sum of \$565.11, as costs in the several suits. This was a motion to retax the costs, and it was made in the name of all the attaching creditors.

It appeared from the evidence introduced on the trial of the motion, that the sheriff paid and taxed as costs (1) \$40.50 for the services of four clerks in making an inventory of the goods levied on, to be attached to his return; (2) \$90 to one Jones,

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who was his regular deputy, for sleeping in and guarding the house in which the goods were stored, for forty-five nights; (3) \$50 to said Jones, for services as "clerk in conducting the sale;" and (4) several other items, embracing amounts paid for "extra clerk-hire," removing iron safe, printing notice of sale, "clerk's hire in report of sale," and for an account book and lamp chimneys. There were also included in the bill of costs amounts paid for store rent, hauling goods, fee to auctioneer, fees of circuit clerk, and amounts reserved by him as his fees for levying and returning the attachments, and as his commissions on proceeds of sale.

Evidence was also introduced showing that the goods were kept in a brick house located in the principal business block in the town of Greensboro; and tending to show that it was necessary for the safety of the goods, that a guard should sleep in the building where the goods were stored; that Jones rendered the services as guard under contract with the sheriff for special compensation, and that his services were worth what he received for them; that the clerks who were employed by the sheriff were necessary for making out the inventory, and for selling the goods, and that their services were reasonably worth what the sheriff paid them. The bill of exceptions does not purport to set out all the evidence.

The judgment of the court on the motion was, "that the item of \$50 for clerk hire allowed to Jones be disallowed; that the item of \$90 to said Jones as guard be reduced to the sum of \$70; that the item of \$10 for making report of sale be disallowed; and that all others are allowed by the court." This judgment is here assigned as error.

THOS. R. ROULHAC, for appellant.

JAS. E. WEBB, *contra*.

STONE, J.—The true construction of our statutes, as ruled by this court, is, that for services rendered by ministerial officers, when the law fixes and defines the fees or commissions, the officer shall receive no other or greater compensation for the services thus enumerated, than the law declares. The legislature, in its wisdom, has fixed the rate on an average scale: and while for some services he is required to render, his compensation may be inadequate, by reason of the particular circumstances attendant on that service, in others it will be found ample, if not bountiful, by reason of the light labor it imposes. The officer accounts the office with its benefits and burdens. Code of 1876, §§ 5017, 5032; *Chenault v. Walker*, 13 Ala. 605;

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*Lee v. Smyley*, 16 Ala. 773; *Dent v. The State*, 42 Ala. 514; *Tillman v. Wood*, 58 Ala. 578.

The statute has declared what commissions the sheriff shall demand and receive for collecting money on a *fiery facias*. This includes all the acts of levy and sale, if need be, required to effect the collection. His fees are the same, whether he receives the money from the defendant on demand, or whether he is put to the trouble of levying and selling, in order "to make the money;" and this rule prevails, whether the claim is large or small. And the rule of commissions in attachment suits is the same, with the exception that a small extra fee is allowed for making the levy. We can not think that clerk-hire, in the matter of perfecting the levy, or making the return, was ever contemplated as a special charge or allowance. It is the sheriff's duty to perfect the levy and to make the proper return; and these are embraced in the command to "cause to be made," for which he receives certain commissions. If he may farm out all the labor attending the levy, sale and return, and charge that on the fund, what labor does he perform, for which he receives the commissions the statute allows?

It is made the duty of the sheriff to safely keep goods levied on, and a strict measure of accountability rests on him, if he fails therein. He must employ such diligence as an ordinarily prudent man employs about his own, taking into the account the nature of the chattel to be preserved.—*Freeman on Ex.* § 270. A stock of merchandise requires more labor and care in its levy, preservation and sale, than ordinary chattels. When seized, its removal to some other custody is frequently necessary, and it needs relatively more capacious storage for its safe preservation. We think, too, that so movable and tempting a commodity as ordinary merchandise, will frequently, if not generally, justify the presence of a guard, or watchman at night, to guard it against theft and incendiarism. These two services, both, in their nature, somewhat peculiar to the character of the property, we think should justify a special, reasonable allowance to the sheriff, to be charged upon the product of the sale.—*Walker v. Ham*, 2 N. H. 238; *Crocker on Sh'ffs*, § 1144.

The judgment of the circuit court is reversed, and proceeding to render the judgment the circuit court should have rendered, it is adjudged that, in addition to the items of cost and expense, to which moveant withdrew his objections, aggregating \$309.01, the sheriff be allowed the following items of charge:



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For guard of merchandise.....	\$60 00
“ removing iron safe.....	1 50
“ printing notice of sale.....	6 00
	<hr/>
	\$67 50

All other claims are disallowed.

The judgment of the circuit court is reversed and here rendered, at the cost of the appellee.

## Rice v. Drennen, Adm'r.

### *Application in Probate Court for Decree of Sale of Decedent's Lands for Division.*

1. *Application for sale of decedent's lands; when plea to good.*—A plea interposed by one of the heirs to an application in the probate court by the administrator of a decedent's estate for an order to sell lands for division, denying all the allegations of the application, is good on demurrer; and a ruling of the court adjudging the plea bad is erroneous.

2. *Same; what can not be regarded as error without injury.*—Such ruling can not be regarded as error without injury, on the ground that the cause was afterwards tried upon its general merits, when it does not appear that the contestant offered any evidence; as this court can not know that he was not deterred therefrom by the erroneous ruling of the primary court.

3. *Same; what no answer to.*—It is no answer to such an application, that the heirs have agreed to dispense with an administration upon the estate, and have undertaken to deal with the lands as their own, even to the extent of creating a trust therein. If the case is one of impertinent or oppressive interference with the equitable rights of the heirs, they must seek relief in equity.

4. *Same; motion to revoke letters not pertinent to.*—To such an application, a motion by the heirs to revoke the letters of administration, is not pertinent; and, on the hearing of the application, such a motion can not be entertained.

APPEAL from Blount Probate Court.

Tried before Hon. J. W. MOORE.

This was an application by Charles Drennen, as the administrator of the estate of James Rice, deceased, for the sale of designated lands, of which his intestate died seized and possessed, for division, and on the ground that the same could not be equitably divided among the heirs without a sale. George R. Rice, one of the heirs, appeared on the day set for the hearing of the application, and contested it, filing three pleas thereto, which are as follows: (1) A denial of “the matters and things stated and set up” in the application; (2) “that the lands described in said petition are not lands belonging to said estate,

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and are not subject to administration and sale in this proceeding ;” and (3) “ that under and by virtue of a conveyance, or agreement in writing, made and entered into by and between the widow of said James Rice, deceased, and his heirs at law, on 6th day of September, 1875, it was agreed that the estate of the said James Rice, deceased, should be wound up without letters of administration, and that it was by said [parties] thereby agreed that said George Rice and E. J. Rice should proceed to sell the personal property and real estate of said estate, and settle all just demands against the estate of said decedent, and hold all the remainder of the proceeds subject to the support of the widow of said decedent ; and thereby said widow relinquished her right of dower to the heirs, under and by virtue of said conveyance and agreement in writing ; and, in consideration thereof, said George Rice and E. J. Rice entered upon, and begun the discharge of the trust thereby imposed and conferred, having given bond therefor, and so were, at the commencement of this administration, and are now discharging the same ; that at the commencement of this administration, said lands were in the possession of said George and E. J. Rice thereunder, through tenants, and are so in possession now ; that said George Rice and E. J. Rice have held and controlled said lands thereunder since the making of said conveyance or agreement ; and that said George Rice and E. J. Rice, proceeding thereunder, sold the personal property of said decedent, and applied the proceeds thereof, as thereby directed, and paid all the debts existing against said estate ; all being before this administration was commenced.” As recited in the decree, pleas numbered one and two were “ overruled by the court ;” and a demurrer interposed by the administrator to the third plea, which is set out in the record, was sustained. It appears from the record that the said James Rice departed this life in 1875, intestate, and leaving him surviving a widow and several heirs, among whom were the said George R. Rice and E. J. Rice ; that the said Drennen was appointed administrator on 1st December, 1882 ; and that he, at the time of his appointment, was interested in said land, having purchased the interests of the widow, Huldah Rice, and of one of the heirs, Mary Maroney. On the hearing, as shown by the bill of exceptions, “ the said George Rice moved the court, upon the facts set out in his third plea in answer to said petition, with the additional fact, that both the persons under whom Charles Drennen claims to be interested in said estate or lands, and on account whereof he sought and obtained letters of administration on said estate, as shown in his petition for grant of letters, namely, Huldah Rice and Mary Maroney, joined in the execution of said conveyance, or instrument of writing, mentioned

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in said third plea, to set aside and vacate the order granting such letters, and to quash the proceedings thereunder; but the court overruled and refused said motion, and to this action of the court the defendant, George Rice, duly excepted." Exceptions were reserved to other rulings of the probate court, but as they are passed on by this court in a general way, they are not here set out.

The probate court granted the prayer of the application, and entered a decree for the sale of the lands described therein, from which this appeal was taken. The rulings above noted, among others, are here assigned as error.

HAMILL & DICKINSON, for appellant.

JNO. A. LUSK, *contra*.

SOMERVILLE, J.—The present proceeding is an application made by an administrator to the probate court, for the sale of lands belonging to the estate of a decedent, such sale being intended for distribution among the heirs. The jurisdiction is invoked under section 2449 of the present Code (1876), which provides that lands of an estate may be sold by order of the probate court, "when the same can not be equitably divided among the heirs or devisees."

The heirs appeared by attorney and contested the application by filing three pleas, objections to all of which seem to have been sustained by the court, although it does not clearly appear in what form they were presented by the petitioner. It is stated in the record that the first and second pleas were "overruled" by the court, and that a demurrer was sustained to the third plea.

We are unable to perceive upon what ground the first plea was adjudged bad. It was a general denial of all the allegations of the application, being tantamount, in legal effect, to the general issue in ordinary cases of pleading. The court erred in pronouncing it bad, in whatever form the objection to it may have been presented.

It is contended that this action of the court must be regarded as error without injury, as the case seems afterwards to have been tried upon its general merits. It does not appear, however, that the contestants offered any evidence in the cause whatever, and we can not know that they were not deterred from doing so by this erroneous ruling of the court. They had a right to suppose that, in as much as the plea had been pronounced bad, all evidence offered in support of it would have been excluded by the court on objection taken to it by the petitioner.



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The second and third pleas were both bad on demurrer. If the lands described in the petition belonged to the decedent at the time of his death, and the heirs acquired title from him by descent, or devise, it is no answer, at least in a court of law, to an application filed by the administrator, containing the necessary jurisdictional allegations, that the heirs have agreed to dispense with an administration, and have undertaken to deal with the lands as their own, even to the extent of creating a trust in them. It is true, that where the estate is one merely in trust, the probate court has no jurisdiction to order a sale of it for distribution.—*Wimberly v. Wimberly*, 38 Ala. 40. But it is no objection that the title of the decedent was equitable and not legal.—*Duval v. McLoskey*, 1 Ala. 708; 1 Brick. Dig. p. 440, § 174. So where the title held by the heirs is not the one which they acquired from the intestate or the testator by descent or devise, but has been derived from some other source, the court will not, on application by the executor or administrator, order a sale of the lands.—*McCain v. McCain*, 12 Ala. 510; *Johnson v. Collins*, *Ib.* 322; *Wharton v. Moragne*, 62 Ala. 201. It seems to us that it is no answer to the application, that the heirs have encumbered their title, or agreed between themselves to dispense with the machinery of an administration. The statute confers on the administrator the right to make the application, and upon proof of the requisite allegations, it is the duty of the court to grant the order of sale. Cases like the present are made no exception to the general provisions of the statute. The most that can be alleged in behalf of the agreement of the heirs is, that it constitutes a mere *equitable* estoppel. But as to this, we decide nothing. The pleas under consideration do not controvert the facts alleged in the petition. They present an issue which at law is immaterial, and, therefore, no defense to the proceeding. If the case is one of impertinent or oppressive interference with the equitable rights of the heirs, they must seek relief in another forum whose powers are ample to protect them.—*Owens v. Childs*, 58 Ala. 113.

The motion made by the contestants to revoke the petitioner's letters of administration was properly overruled. It was a motion not pertinent to the present proceeding. It can not be doubted that the probate court possesses authority to revoke letters of administration which have been improvidently granted.

But the practice, in such cases, is for some interested party, desiring to have the letters revoked, to make an application in writing, setting out the facts which authorize the court to act, and invoking its jurisdiction for this purpose. It must be a direct proceeding, due notice of which must be given to the administrator, who has a right to appear and contest it, by showing cause why the prayer of the petition should not be

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granted. Great injustice, as well as confusion, would result by allowing such an issue to be collaterally injected into a proceeding to which it has no relevancy.

There is nothing in the other assignments of error.

Reversed and remanded.

## Drakford v. Turk.

### *Attachment for Enforcement of Rent.*

1. *Attachment issued for cause not authorized by statute; remedy for.* When an attachment is sued out for a cause of action upon which the statutes do not authorize its issue, the irregularity can not be reached by a plea in abatement, or by a motion to quash; but the appropriate method of reaching such irregularity is a rule upon the plaintiff to show cause against the dissolution of the writ and its levy; and the motion for the rule must precede a plea to the merits.

2. *Lien of landlord on crops grown on rented lands; when does not exist in favor of mortgagee of landlord.*—A mortgagee, giving notice to the tenant of the mortgagor, that he claims the rent falling due in the future, does not become, by virtue of the notice, entitled to the statutory lien on the crops grown on the rented premises for the payment of the rent; nor can he enforce the lien by attachment.

3. *When tenant of mortgagor not tenant of mortgagee.*—When a mortgage on lands is executed prior to the renting of the premises by the mortgagor, and prior to the entry of the tenant, a mere notice by the mortgagee, that he claimed the rent, does not convert the tenant into the tenant of the mortgagee.

APPEAL from Macon Circuit Court.

Tried before Hon. JAMES E. COBB.

This was an attachment commenced by A. H. Drakford and Campbell & Wright against Lorenzo Turk, to enforce an alleged landlord's lien on crops grown on rented lands for the rent. On motion of the defendant, the court granted a rule upon the plaintiffs to show cause against the dissolution of the writ and levy. The ground of the motion was, in substance, that the relation of landlord and tenant, resulting from contract, did not exist between the plaintiffs and defendant; and that, therefore, they had no lien on the crops levied on. On the evidence introduced on the hearing, the court, a jury having been waived, rendered judgment, "dissolving, dismissing and quashing the writ of attachment;" to which ruling the plaintiffs excepted. The opinion does not render it necessary to set out the evidence introduced on the trial.

The ruling above noted is here assigned as error.

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W. C. BREWER, for appellant.

J. A. BILBRO, *contra*.

BRICKELL, C. J.—When an attachment is sued out for a cause of action upon which the statutes do not authorize its issue, the irregularity can not be reached by a plea in abatement, or by a motion to quash it. Such plea, or motion is appropriate only to reach defects or irregularities apparent on the face of the affidavit, bond, or writ, and do not involve an inquiry into the nature or character of the cause of action. The appropriate method of reaching the objection, that the writ will not lie for the enforcement of the particular cause of action, is a rule upon the plaintiff to show cause against the dissolution of the writ and its levy; and the motion must precede a plea to the merits.—*Jordan v. Hazard*, 10 Ala. 221; s. c. 12 Ala. 180; *Brown v. Coats*, 56 Ala. 439; *Rich v. Thornton*, 69 Ala. 473.

The motion for the rule to show cause why the attachment should not be dissolved was interposed, and is the motion upon which the judgment of the circuit court dissolving the attachment is founded. The question, therefore, now raised is, whether a mortgagee, giving notice to the tenant of the mortgagor, that he claims the rent falling due in the future, by virtue of the notice, becomes the landlord of the tenant, entitled to the statutory lien on the crops grown on the rented premises for the payment of the rent, and can by process of attachment enforce the lien. The question must be answered negatively. There is no relation of privity or contract between the mortgagee and the tenant; and if there is a relation arising between them which can be denominated that of landlord and tenant, it arises only by implication of law. The statute contemplates only the conventional relation of landlord and tenant, subsisting because of the contract between the parties. It has not been construed as extending to the relation when arising by implication or operation of law, working an entire change of the party standing according to the contract in the relation of landlord.—*Tucker v. Adams*, 52 Ala. 254. But in this case the mortgage was executed before the renting of the premises, and before the entry of the tenant. A mere notice by the mortgagees that they claimed the rent, would not convert the tenant into the tenant of the mortgagees.—*Comer v. Sheehan*, 74 Ala. 452.

There was no error in the judgment of the circuit court, and it must be affirmed.



[Fulghum v. Roberts.]

## Fulghum v. Roberts.

*Action against Judge of Probate for Penalty for issuing Marriage License to Minor in Violation of Provisions of Statute.*

1. *Qui tam action against judge of probate for issuing marriage license; effect of amendatory acts on pending suit.*—Neither the act of March 1st, 1881, amending section 2681 of the Code of 1876 (Pamph. Acts, 1880-1, p. 31), nor the act of February 5th, 1883, amending the act of March 1st, 1881 (Pamph. Acts, 1882-3, p. 38), affected the rights of parties to an action brought against a judge of probate for issuing a marriage license to a minor contrary to the statute, under section 2681, as it originally stood, and pending at the time of the approval of both of the amendatory acts.

APPEAL from Greene Circuit Court.

Tried before Hon. S. H. SPROTT.

This was an action by Simeon Fulghum against Thomas W. Roberts, and was commenced on 27th January, 1881. The original complaint is as follows: "The plaintiff, Simeon Fulghum, who sues on his own behalf, and on behalf of the State of Alabama, claims of the defendant, Thomas W. Roberts, the sum of five hundred dollars for this, that said defendant, while acting probate judge of Greene county, Alabama, after having given bond and qualified according to law, did, on the 26th day of May, 1880, as such probate judge grant and issue a marriage license for the celebration of the rites of matrimony between one Richard Carpenter and Virginia Fulghum, daughter of said plaintiff, Simeon Fulghum, an infant at the time, under the age of eighteen years, said infant having had no former husband. And plaintiff avers that said license was granted without the consent of the parent or parents of Virginia Fulghum, given personally before said probate judge, for the celebration of said marriage, or without the consent of said parent or parents, given in writing, and the execution of the same proven before said probate judge, for the celebration of said marriage of said Virginia Fulghum to the said Richard Carpenter." The cause was tried at spring term, 1883, of said court, when, a demurrer interposed by the defendant to the complaint having been sustained, the plaintiff filed an amended complaint, on which the trial was had, resulting in a verdict and judgment for the defendant. The opinion does not render

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it necessary to set out the facts disclosed by the evidence, or the exceptions reserved on the trial.

The ruling on the demurrer above noted is among the assignments of error here made.

H. C. TOMPKINS and THOS. W. COLEMAN, for appellant.

J. P. McQUEEN and THOS. SEAY, *contra*.

STONE, J.—The present suit was brought in January, 1881, for an alleged injury committed before that time. In *Roberts v. Pippen*, at this term [*ante* p. 103], we ruled that neither the act “to amend section 2681 of the Code,” (Pamph. Acts, 1880–1, p. 31), nor the act to amend said act, approved February 5th, 1883, (Pamph. Acts, p. 38), affected the rights of parties, circumstanced as these were. The result of the ruling is, to require a reversal of this case in many particulars, notably, in the judgment sustaining the demurrer to the original complaint. The case must be tried without reference to either of those amendatory statutes. We need not particularize the errors committed.

Reversed and remanded.

## Huckabee v. Shepherd.

### *Assumpsit.*

1. *Record of deed; when admissible in evidence.*—Held, that the primary court did not err in admitting in evidence, in this case, a record of a deed to lands, which had been duly recorded, on proof that the original was not in the custody or under the control of the party offering it.

2. *Charge given and withdrawn; error without injury.*—When a charge, given by the court of its own motion, is withdrawn from the consideration of the jury during the progress of the trial, if it contain error, it is error without injury, which will not work a reversal.

3. *Pleading and practice; when allegations of time not material.*—Allegations of time, when not descriptive of the subject of the action, are not required to be proved strictly as alleged; and hence, in an action on account, the failure of the plaintiff to prove the exact date when the account became due, is not a fatal variance.

4. *When parol contract not merged in subsequent written one.*—Where an agent, employed by parol to sell land at a stipulated compensation, afterwards purchases himself, with the understanding that his right to compensation shall not be affected by his becoming the purchaser, and the contract of purchase is reduced to writing, in which nothing is said about compensating him, the prior agreement for compensation is independent of, and distinct from the contract of sale, is not merged therein,

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and may be established, without infringing the rule excluding parol evidence of antecedent or contemporaneous stipulations which contradict or vary the legal effect of written instruments.

APPEAL from Bibb Circuit Court.

Tried before Hon. JAMES E. COBB.

This was an action of assumpsit by A. K. Shepherd against C. C. Huckabee, the plaintiff declaring on an open account, an account stated, for money paid, and for work and labor done; the amount sued for being alleged to have become due on 15th October, 1880. The cause was tried on the plea of the general issue, the trial resulting in a verdict and judgment for plaintiff.

The evidence introduced on behalf of the plaintiff tended to show that the defendant, being authorized to sell certain lands in Bibb county, known as the property of the "Bibb County Iron Works," for a stated compensation, agreed with the plaintiff to give him a part of that compensation, if he would aid the defendant in making a sale of the lands; that the plaintiff, after commencing negotiations with third parties for a sale of the lands, but before consummating it, purchased the property himself; and, on 14th October, 1880, the contract of sale was reduced to writing and executed by plaintiff and defendant; that the purchase was made by plaintiff "for himself and associates," although not so expressed in the writing, and, at the time it was made, the plaintiff had no one associated with him in the transaction, "but it was understood that others were to come in;" and that when the contract was made, both before and after it was signed, the defendant stated, in answer to questions put to him by the plaintiff, that the latter's taking an interest in the purchase would not affect his right to the stipulated part of defendant's compensation for making the sale. It is not shown when the plaintiff was to have been paid for his services. The evidence for the defendant tended to show that he did not agree to pay plaintiff any compensation whatever.

The plaintiff, after testifying that the original "was not in his custody or under his control," and showing that it was not in the possession of his attorney, was allowed to read to the jury, against the defendant's objection, the record of the deed conveying said property in pursuance of said contract of sale, as recorded in the office of the judge of probate of said county; and to this ruling the defendant excepted.

The court, having, in its general charge, given an instruction to the jury, on exception thereto by the defendant, stated to the jury that the instruction "was withdrawn from them as the defendant objected to it." The defendant also excepted to the refusal of the court to give the following charges requested



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by him in writing, to-wit: 2. "It is the duty of the plaintiff to prove his cause of action as alleged in his complaint; and if in this case, the plaintiff alleges a claim to be due him on a particular date, and fails by his proof to show when his claim accrued, then the jury must find for the defendant." 4. "When parties are negotiating in reference to a given thing, and they reduce their contract to writing, the writing becomes the exposition of the contract of the parties, and can not be varied by parol evidence."

The rulings above noted are here assigned as error.

WM. C. WARD, for appellant.

WATTS & SON and SUTTLE & PETERS, *contra*.

SOMERVILLE, J.—There was no error in the action of the court admitting in evidence the original book containing a registration of deeds, which was a record required by law to be kept in the office of the probate judge. The purpose of its introduction by the plaintiff was to prove the contents of a registered deed executed by the defendant to plaintiff and one Carter, which had been recorded as prescribed by law. This was clearly permissible after the predicate had first been laid, showing that the original deed was not in the custody or under the control of the party introducing this secondary evidence. The statute expressly authorizes a certified transcript of such record to be admitted, under the above conditions. No reason can be seen why a copy should be received, and the original record itself excluded.—*Lawson v. Orear*, 4 Ala. 156; *Carwile v. House*, 6 Ala. 710.

If there was any error in the charge given by the court, to which exception was taken, it must be presumed to be error without injury, in view of the fact that this charge was withdrawn by the court from the consideration of the jury, during the progress of the trial.

The second charge requested by the defendant was properly refused, because it assumed a variance to exist if the plaintiff failed to prove the exact date when the account became due, or his cause of action on the common counts accrued. Allegations of *time*, like those of place, quantity, quality and value, when not descriptive of the subject of the action, are not required to be proved strictly as alleged.—1 Greenl. Ev. §§ 61, 56. The statute of limitations not having been pleaded in defense of the action, the particular time when the account became due was clearly immaterial, provided only this time was prior to the institution of the suit.

The contract between the plaintiff and the defendant, bearing—  
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ing date on the 14th of October, 1880, had reference only to the purchase of the property, known as the "Bibb County Iron Works," it being shown that the plaintiff was only acting as agent for a company in which he had an interest. This written instrument contains no reference to the subject of any compensation or commission to be received by the plaintiff for effecting such sale. It may be that, presumptively, a vendee is not entitled to commissions for effecting a sale between the vendor and himself. But there was proof here tending to rebut this presumption, by showing an express agreement to the contrary. The agreement of the parties as to commissions was anterior to, as well as distinct from the contract of sale itself. The case, then, is one where the particular contract sued on was not reduced to writing, and where the one actually put in writing was not intended to contain all matters of agreement between the parties. Oral evidence is admissible in such cases to show this state of facts, without infringing the rule excluding parol evidence of contemporaneous stipulations, which contradict or vary the legal effect of written instruments.—*Brown v. Isbell*, 11 Ala. 1009; 1 Add. Contr. (Am. Ed.) § 243. This principle is a qualification of the general rule last stated, and is admitted to be of difficult, and often of delicate application in practice. But it is well founded in reason, as well as established by authority, and is often invoked by the courts "to enable one party to escape from the fraud or injustice of the other."—1 Greenl. Ev. (Redf. Ed.) § 284a. In this view of the law, there was no error in refusing the fourth charge requested by the appellant.

Judgment affirmed.

## Cotton et al. v. Cotton.

### *Bill in Equity for Specific Performance of Contract for Purchase of Lands.*

1. *Contract ; when to be performed within a reasonable time.*—When a contract does not specify a particular time, or appoint the happening of a particular event for the performance, the presumption is, that the parties intended performance within a reasonable time; and what is a reasonable time, depends materially upon the nature of the duty to be performed, the relation of the parties, and the peculiar circumstances of the particular case.

2. *Same ; reasonable time for performance ; when a question of law, and when of fact.*—What is a reasonable time for performance, is sometimes a question of fact, and sometimes a question of law. When it de-

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pend upon facts extrinsic to the contract, which are matters of dispute, it is a question of fact; but when it depends upon the construction of a contract in writing, or upon undisputed extrinsic facts, it is matter of law.

3. *Contract for sale of lands; what a reasonable time for performance.* Under a contract for the sale of lands, by which the vendor covenanted to convey so soon as he could ascertain the numbers, in the absence of all evidence of intervening impediments, the court inclines to the opinion that six months would be ample time for performance, but adds that, for the purposes of the present case, the court may take two years as a reasonable time, the period allowed to the vendor to obtain title in *Garnett v. Yoe*, 17 Ala. 74.

4. *Same; when bill for specific performance barred.*—When the vendee under executory contract for the sale of lands is not, and has not been within ten years, in possession, and the possession has not been in recognition of his right, the statute barring an action at law to recover damages for a breach of the covenant to convey, upon the expiration of ten years from the breach, applies to a suit in equity by the vendee for a specific performance.

APPEAL from Greene Chancery Court.

Heard before Hon. THOMAS COBBS.

The facts are sufficiently stated in the opinion.

HEAD & BUTLER, for appellants.

WM. P. WEBB and H. M. JUDGE, *contra*.

BRICKELL, C. J.—The purpose of the original bill, filed on 21st October, 1881, is the specific performance of a contract, made and entered into on the first day of January, 1867, by which the defendant in writing bound himself, and covenanted that he would convey to the ancestor of the complainants five hundred acres of a larger tract of land, when he could ascertain the numbers thereof. The defendant remained in the open, notorious, continuous possession of the entire tract, taking the rents and profits, claiming title, and exercising acts of ownership. The ancestor of the complainants died in 1879, or 1880, not having during his life claimed the performance of the contract, or sought by legal remedies a recovery of damages for a breach of its covenant or condition. Assuming that the duty of ascertaining the numbers of the lands is devolved on the defendant, and the further duty of giving notice to the vendee of the fact that he had ascertained them, and was ready to convey, he was bound to the performance of the duty in a reasonable time; he could not delay or procrastinate the day of performance indefinitely, at his mere will; nor could the vendee, by neglect to demand performance, keep alive the covenant, as a stipulation to be performed at his mere option. The rule of law is, that when a contract does not specify a particular time, or appoint the happening of a particular event, for



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performance, the presumption is the parties intended performance within a reasonable time. What is a reasonable time, is sometimes a question of fact, and sometimes a question of law. When it depends upon facts extrinsic to the contract, which are matters of dispute, it is a question of fact; when it depends upon the construction of a contract in writing, or when it depends upon undisputed extrinsic facts, it is matter of law.—1 Brick. Dig. 397, §§ 281-82.

In *Garnett v. Yoe*, 17 Ala. 74, the vendor covenanted that he would make titles to lands so soon as he could obtain them. Two years elapsed without his having obtained them, or having made an effort to obtain them, and there was no effort on the part of the vendee to quicken his diligence. Upon these undisputed facts, the court pronounced, as matter of law, that a reasonable time for performance of the covenant had passed; that it was broken, and that the vendor was answerable in damages for the breach. What is a reasonable time for the performance of a contract, the parties not appointing a time for performance, depends materially upon the nature of the duty to be performed, the relations of the parties, and the peculiar circumstances of the particular case. The duty devolved upon the vendor was simple, easy of performance in a very brief period of time. An examination of his title papers would probably have disclosed the true numbers of the land according to the governmental survey, or if it would not, a survey could readily have been made by the county surveyor, by which the vendee would have been bound *prima facie*, if notice of it was given him. If it were necessary to fix a reasonable time for the performance of the duty, in the absence of all evidence of intervening impediments, we would incline to the opinion that six months would be ample. But for all the purposes of the present case, we may take as reasonable the period of time allowed in *Garnett v. Yoe*, *supra*, to the vendor to obtain titles. The covenant was then broken for a period of thirteen years, nine months and twenty days, before the institution of this suit.

A vendee, holding a bond or covenant for the conveyance of the title to lands at a future day, may elect to proceed at law for the recovery of damages, or he may resort to a court of equity for specific performance; the remedy he will elect lies in his own discretion.—*Haynes v. Farley*, 4 Port. 528; *Greene v. Allen*, 32 Ala. 215. An action at law to recover damages for a breach of this covenant, the plaintiff not resting under disability of suit, was barred upon the expiration of ten years from the breach.—Code of 1876, § 3225. When the vendee is not, and has not been within ten years, in possession; when the possession has not been in recognition of his right, the statute

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applies to a suit in equity for a specific performance, as well as to a suit at law for the recovery of damages.—Waterman on Specific Performance, §§ 89–102; *Peters v. Delaplaine*, 49 N. Y. 362. There is, in such case, nothing upon which a court of equity can lay hold, and withdraw it from the operation of the statute. Prior to the Code, the rule upon which courts of equity proceeded uniformly was, that in all cases of concurrent jurisdiction, though the statutes did not mention equitable remedies, and were in terms directed against legal actions, they were as obligatory upon the court as upon courts of law. If the right or demand was equitable, of pure, exclusive equitable cognizance, the statute was adopted and applied by analogy.—1 Brick. Dig. 608, §§ 852–54. The Code, in express terms, declares the statutes are applicable to and govern suits in equity. Code of 1876, § 3758.

There is no fact or circumstance which will withdraw this case from the operation of the statute. The concession may be made to the complainants (though there would be in view of the evidence much of difficulty in supporting it), that the bond to their ancestor is valid and founded on a valuable consideration. The stubborn fact remains, that for more than fifteen years after the execution of the bond, for more than thirteen of which the ancestor had a plain, unembarrassed right of action, or of suit in equity, the vendor remained in open, notorious, continuous possession, taking the rents and profits, asserting title in himself exclusively. We concur in the opinion of the chancellor, that the statute of limitations is a bar to the suit.

Affirmed.

## Russell v. Garrett, Adm'r.

### *Bill in Equity by Creditor to vacate and set aside Fraudulent Conveyances of Debtor's Property.*

1. *Bill to set aside fraudulent conveyances; when not multifarious.*—A bill in equity by a creditor, seeking to vacate and set aside several conveyances of the debtor's property as fraudulent, and to subject the property to the satisfaction of his demand, is not multifarious, because the several grantees, who are joined as parties defendant, acquired different portions of the property under separate and distinct conveyances, executed at different times, the bill imputing to the defendants a common knowledge of the debtor's fraudulent intent, and a common purpose of participation in it, by mutual combination.

2. *Same.*—Nor is such a bill subject to the objection of multifarious-

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ness, because a portion of the indebtedness due the complainant from the debtor consisted of a claim for which one of the grantees, who is a defendant, was also liable as partner, no relief being claimed against such grantee on the debt, except so far as it may constitute the complainant a creditor of the grantor and principal debtor.

3. *Bill of discovery; what is not.*—Where the only discovery sought in a bill in equity is purely incidental, being such as may be elicited by the interrogating part of the bill, consisting of a series of questions intended to obtain discovery in aid of the complainant's case, and required to be directed to facts previously stated or charged, the bill can not be treated as one for discovery alone, or its sufficiency tested by the rules governing that class of bills.

4. *Waiver of answer under oath; may be incorporated in interrogating part of bill.*—While it is the more common practice to waive an answer under oath to a bill in equity in the foot-note required to be appended to the bill, it may be done in the interrogating part of the bill; this being plainly authorized by the statute, and not prohibited by the 13th Rule of Chancery Practice.

#### APPEAL from Limestone Chancery Court.

Heard before HON. THOMAS COBBS.

The bill in this cause was filed by P. F. Garrett, as the administrator, with the will annexed, of Eliza A. F. Lane, deceased, against Edwin J., John M., William B., George R., and Thomas A. Russell, for the purpose stated in the opinion. The defendants interposed demurrers to the bill, which were overruled by the chancery court. The case made by the bill, and the grounds of the demurrers are sufficiently indicated in the opinion. To the bill is appended a foot-note, requiring the defendants to answer "each and all the statements and charges in this bill, and each and all the foregoing interrogatories;" but, by the foot-note, answers under oath are not waived. This, however, is done in the interrogating part of the bill, its language being, "To the end, therefore, that the said defendants may show why your orator should not have the relief hereby prayed, and may, *without oath*, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true direct and perfect answer make," etc.

The decree overruling the demurrers is here assigned as error.

HUMES, GORDON & SHEFFEY and W. R. FRANCIS, for appellants.

McCLELLAN & McCLELLAN and H. C. TOMPKINS, *contra*.

SOMERVILLE, J.—The bill is filed for the purpose of setting aside conveyances and transfers of property made by Edwin J. Russell to his four brothers, who are co-defendants, on the ground that they were made with the intent to hinder,



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delay or defraud creditors, the said Russell being at the time largely indebted to complainant's intestate. A demurrer was interposed to the bill by each of the defendants, and was overruled by the chancellor. The appeal is taken from this decree, upon which the assignments of error are exclusively based.

The bill, in our opinion, is not multifarious. It has long been the practice of courts of equity, in creditors' bills of this character, to sanction the joining of parties defendant who have acquired different portions of the debtor's property under separate and distinct conveyances, made with intent to defraud. "The object and purpose of the suit is single, the satisfaction of the demands of the creditors from the property of the debtor, and all that can be said is, that different persons have, or claim to have, separate interests in distinct or independent questions connected with, or springing out of that common purpose.—*Lehman v. Meyer*, 67 Ala. 396, and cases cited; 1 Dan. Ch. Pr. (5th Ed.) 339, NOTE 1; *Halstead v. Shepard*, 23 Ala. 558; *The P. & M. Bank, v. Walker*, 7 Ala. 926. The facts alleged in the bill impute to the defendants a common knowledge of the debtor's fraudulent intent, and a common purpose of participation in it, by mutual combination. It is no objection, in this aspect of the case, that the alleged fraudulent conveyances were made at different times.

Nor do we think it any ground of objection that a portion of the indebtedness due complainant from Edwin J. Russell consisted of a claim for which George R. Russell, one of the other defendants, was also liable in the capacity of a partner. The debt was a several, as well as a joint obligation, under the statute, and whether verbal or written, the members of the partnership could be sued upon it severally, or jointly, at the option of the complainant.—*Hall v. Green*, 69 Ala. 368; Code, 1876, § 2904. We construe the bill to claim no relief against the copartner, George R. Russell, based on this claim, except so far as it may constitute the complainant a creditor of the main defendant in the suit, Edwin J. Russell. It is not a case, therefore, of multifariousness originating in uniting a joint claim against several defendants with a separate claim against one defendant alone, with which the other defendants have no connection.—*McIntosh v. Alexander*, 16 Ala. 87.

The bill derives no part of its equity in its aspect as one for discovery. Such is not its frame or purpose. The only discovery sought is purely incidental, such as may be elicited by the interrogating part of the bill, which consists of a series of questions intended to obtain discovery in aid of the complainant's case, and required to be directed to facts previously stated or charged. These interrogatories are chiefly designed to "prevent misapprehension or evasion, by inquiring not only as to the

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facts specifically alleged, but as to circumstances of possible variation."—Adams' Eq. 307; 1 Dan. Ch. Pr. 484. The demurrers erroneously treat the bill as one for discovery alone, where the averments required to be made are of a particular character, so often repeated in our decisions as not to require reiteration at this time.—*Sullivan v. Lawler*, 72 Ala. 72; *Shackelford v. Bankhead*, *Ib.* 476.

The statute provides that "when a bill is filed for any other purpose than discovery only, the plaintiff may waive, *in or upon the bill*, the answer being made on the *oath* of the defendants, or either of them."—Code, 1876, § 3762. While the more common practice is to do this in the usual foot-note required to be appended to the bill, it is often done in the interrogating part, and to this cause there seems to be no sound or even plausible objection. It is plainly authorized by the statute, and is not intended to be prohibited by the 13th Rule of Chancery Practice.—Code, 1876, p. 163.

The demurrers were properly overruled, and the decree of the chancellor is affirmed.

## Kennon & Brother v. Dibble.

### *Trial of Right of Property.*

1. *Chattel purchased by husband with wife's money; when title vests in her.*—Where the husband purchases personal property with moneys, the proceeds of the sale of lands belonging to the wife's statutory separate estate, the property thus purchased also becomes the wife's statutory separate estate, and for its recovery, she may maintain a claim suit under the statute against an attaching creditor of the husband.

2. *Claim suit by wife for crops grown on lands, her statutory estate; when she may maintain.*—A claim suit under the statute may also be maintained by the wife against an attaching creditor of the husband, for the recovery of crops grown on lands belonging to her statutory separate estate.

3. *Chattel purchased by husband with money borrowed on pledge of wife's property; when title does not rest in her.*—A horse purchased by the husband with money borrowed by him on the pledge of chattels belonging to the wife's statutory separate estate, becomes the property of the husband, and for its recovery the wife can not maintain a claim suit under the statute, although the debt was paid and the pledge redeemed with money also belonging to the *corpus* of her statutory separate estate.

4. *Chattel taken in exchange for another, the statutory estate of the wife; title to.*—A parol exchange of an article of personal property, belonging to the wife's statutory separate estate, for other personal property, does not divest her title in the former, nor vest in her the title to the latter. (*Evans v. English*, 61 Ala. 416, and *Pollak v. Graves*, 72 Ala. 347, reaffirmed, and declared to have become rules of property.)

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APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

Kennon & Brother, a partnership, on 29th December, 1882, sued out an attachment against Oscar C. Dibble, which was levied on two mares, a Jersey bull, a wagon and some corn and fodder, as the property of the defendant in attachment. This property was claimed by Mrs. Lena L. Dibble, the wife of Oscar C. Dibble, and, on her making the statutory affidavit and bond, it was delivered to her by the sheriff. The cause was tried on an issue made up under the statute, the trial resulting in a verdict and judgment for the claimant.

After reading in evidence the writ of attachment, with the levy indorsed thereon, the plaintiff, "proved by the levying officer that the property here claimed was in the possession of the defendant at the time of the levy, that is to say, that said property was on a plantation occupied by the defendant and his wife, and upon which the defendant was engaged in farming." They also proved the value of the property. "The claimant proved that she had once owned a house and lot in Montgomery, Alabama, which was her statutory separate estate, she being at the time a married woman, the wife of defendant; that she and her husband sold and conveyed that property, and invested a part of the proceeds in the plantation in Lee county, upon which the property was found by the levying officer; and that the title to said plantation was in the claimant as her statutory estate." As the evidence introduced on behalf of the claimant further tended to show, the bull and wagon were purchased by the husband, Oscar C. Dibble, and paid for with "his wife's money, derived from the sale of the house and lot as aforesaid." The wagon was purchased in Columbus, Georgia, nothing being said "at the time of the purchase, as to the fact, that the wife's money paid for it." The husband ordered the bull "by letter from Tennessee." There is nothing in the record showing that either the wagon or bull was purchased in the wife's name, or that her name was mentioned in either of the transactions. "The proof showed that the corn and fodder claimed were raised on said plantation in Alabama, and as to this plaintiff made no further claim." The facts disclosed by the evidence touching the two mares are sufficiently indicated in the opinion, except that it may be added that the purchase of the one, and the exchange for the other were both made in Columbus, Georgia.

The plaintiffs reserved an exception to the charge given at the claimant's request, set out in the opinion; and that ruling is the only assignment of error here made.

J. M. CHILTON for appellants. (1) As to the two mares and  
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wagon, the question of the title must be determined by the laws of Georgia, without reference to the married woman's laws of Alabama.—*Peak v. Yeldell*, 17 Ala. 636; *Turner v. Fenner*, 19 *Ib.* 362; *Evans v. Kittrell*, 33 Ala. 452; *Henderson v. Adams*, 35 Ala. 723. That the purchaser's domicile was in Alabama, does not affect the question. Nor did the mere act of bringing it into this State change the title.—*Cahalan v. Smaltz, Monroe & Co.*, 70 Ala. 275. (2) No statute laws of Georgia were put in evidence; and in the absence of such evidence, the common law is presumed to prevail in that State.—*McAnally v. O'Neal*, 56 Ala. 299. By the common law, the property belongs to the husband.—*McAnally v. O'Neal, supra*, and cases there cited; *Cahalan v. Smaltz, Monroe & Co., supra*. (3) What has been said with reference to the two mares and the wagon, also applies to the Jersey bull. It was ordered by letter from Tennessee by the husband; and the laws of Tennessee would govern. (4) If, however, the laws of Alabama govern, the charge of the court can not be sustained. As to the mare purchased, the pledge of the wife's property for the money borrowed, and the subsequent payment of the debt and redemption of the pledge with her money, could not operate to vest title in her. (5) For the other mare the husband exchanged his wife's diamond ring. All the evidence is set out in the bill of exceptions, and it is nowhere shown that the husband and wife conveyed the ring by an instrument in writing attested by two witnesses. The transfer was therefore void.—*Irons v. Reynolds*, 28 Ala. 305; *Drake v. Glover*, 30 Ala. 382; *Whitman v. Abernathy*, 33 Ala. 154; *Bolling v. Mock*, 33 Ala. 727; *Warfield v. Rave-sees*, 38 Ala. 521; *Williams v. Auerbach*, 57 Ala. 94; *Reeves v. Linan*, 57 Ala. 564; *English v. Evans*, 61 Ala. 416. (6) It would seem, if governed by the laws of Alabama, that the purchase of the wagon and bull would vest title in the wife.

GEO. P. HARRISON, JR., *contra*. (1) The law of the domicile, and not the law of place where the negotiations were made, governs in this case.—Wharton's Conf. Laws, § 198; *Castleman v. Jeffries*, 60 Ala. 380. (2) The proceeds of the sale of property belonging to the *corpus* of a married woman's statutory separate estate may be invested in other property, which also becomes the separate estate of the wife.—Code, 1876, § 2709; *Daffron v. Crump*, 69 Ala. 79; *Evans v. English*, 61 Ala. 416. Nor is the rule varied because nothing was said at the time of the purchase as to the person for whom the property was being purchased. See authorities *supra*. (3) So far as the mare acquired by the exchange of the diamond ring is concerned, even should it be held that the wife's right to said

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ring failed to pass, because not shown to have been in writing and witnessed as provided by statute, yet the title remains in the party with whom the exchange was made, and the plaintiffs can not recover, no possession of the mare by the husband having been shown, except in the right of the wife. (4) The claimant was entitled to the charge as given, even if only entitled to recover a part of the property sued for, the statute requiring a special finding as to each piece of property levied on. If not entitled to recover as to all the property, the plaintiff should have asked an explanatory or limiting charge.—*Edwards v. White*, 70 Ala. 365; *Connelly v. P. & M. Ins. Co.*, 66 Ala. 433; *Dickey v. The State*, 68 Ala. 508; *Whilden & Sons v. P. & M. Bank*, 64 Ala. 2; *McClary v. Rash*, 60 Ala. 374; *Chapman v. Holding*, 60 Ala. 523.

STONE, J.—The circuit court, at the written request of claimant, instructed the jury that if they believed the evidence, they must find for the claimant. The claimant, in such a suit as this, stands in the attitude of a defendant; and the substance of this ruling was, that the plaintiffs had failed to make a case entitling them to recover. The claimant went hence without day, under this ruling; for it left no ground for a partial recovery, if the testimony was believed. Such charge was improper, if plaintiffs were entitled to have any part of the property condemned; for in that event the jury could not find for the claimant.

All the testimony tends to show that the Jersey bull and the wagon, though purchased by the husband, were paid for with moneys that were of the *corpus* of the wife's statutory separate estate; the proceeds of the sale of her house and lot. The statute expressly authorizes such investment by the husband, and declares that property thus purchased becomes the separate estate of the wife.—Code of 1876, § 2709. The testimony, if believed, entitled the claimant to these two chattels.

The corn and fodder, according to the evidence, were grown on lands which were the statutory estate of the wife. They were income or profits, not *corpus*. They vested in the husband as trustee, who was not liable to account for them, but they were not subject to the payment of his debts.—Code, § 2706. This is a statutory inhibition, and we feel bound to give effect to it. True, as a general rule, "when it is shown that at the time of the levy the defendant had possession of the property, a presumption of ownership arises. The presumption [generally] can be repelled only by the claimant proving title in himself, or connecting himself with the true title, if it be not in the defendant."—*Pollak v. Graves*, 72 Ala. 347. The statute makes this an exception to that rule, if indeed the

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wife has not such an interest in the trust, as to take it without the operation of the rule. The corn and fodder should not have been condemned to the attachment.

The remaining chattels rest on different principles. The larger mare was purchased with money, and there is no pretense for saying that the money was the property of Mrs. Dibble. The husband himself borrowed it from bank, and with it purchased and paid for the mare. True, when he borrowed the money, he pledged as security for its repayment a watch and chain, which were of the statutory estate of his wife. But this did not have the effect of making either the money or the mare her property. The watch and chain were still hers, notwithstanding their unauthorized pledge by her husband, and, according to our laws, she could have recovered them back, without payment or tender of the debt.—*Whitman v. Abernathy*, 33 Ala. 154. When the husband afterwards paid the debt to the bank with his wife's money, the *corpus* of her estate, and thus redeemed her watch, it is probable this armed her with an equity to trace her money into the mare; which equity would prevail over the claim of the husband, and of any one else, except *bona fide* purchasers and creditors without notice.—*Preston v. McMillan*, 58 Ala. 84. Mrs. Dibble can not maintain her claim to the larger mare in the present proceeding.

The case of the smaller mare, for which the husband exchanged the wife's diamond ring, falls precisely within the principle declared in *Evans v. English*, 61 Ala. 416, reaffirmed in *Pollak v. Graves*, 72 Ala. 347. Those decisions have doubtless become rules of property, and we are unwilling to overturn them. If the question were an open one, possibly it would be the better policy to let such exchanges stand as a change of property, unless the wife herself should seek to disaffirm the contract. It often happens that market commodities, and articles of small value, are of the *corpus* of the wife's statutory estate. These it may be desirable to sell or exchange. It entails exceeding trouble and annoyance to require in all such cases the written conveyance of husband and wife, attested by two witnesses, or acknowledged before some officer, authorized to take acknowledgments of conveyances.—Code of 1876, §§ 2707–8. But these are questions for the legislature. The wife's claim to the smaller mare, under our rulings above, can not prevail.

Reversed and remanded.



[Wortham v. Gurley.]

**Wortham v. Gurley.***Detinue.*

1. *Husband and wife ; when property purchased by husband, wife's statutory estate.*—A purchase of personal property by the husband, in the name of the wife, and for her benefit, creates in her a statutory, and not an equitable separate estate, although the purchase-money is paid from his own means, as a gratuity.

2. *Same ; when wife should sue alone.*—An action of detinue for the recovery of personal property belonging to the *corpus* of the wife's statutory separate estate, is properly brought in the name of the wife alone.

3. *Detinue ; when can be maintained on prior possession.*—As against a mere wrongdoer, and those claiming under him, detinue may be maintained on proof of prior possession.

4. *Possession ; when referred to the title.*—The possession of personal property by a tenant in common, in full recognition of the rights of his co-tenant, is the possession of the co-tenant ; and possession by the husband, or by the husband and wife jointly, of personal property belonging to the wife's statutory separate estate, is her possession.

5. *When seller of personal property and those claiming under him estopped from denying title in him at time of sale.*—Where one in possession of personal property represented that, as partner, he owned an undivided half interest therein, and a sale of the property was effected on the faith of such representation, the purchaser parting with value in the belief of its asserted truth,—*held*, in an action of detinue by the purchaser and the owner of the other half interest, against parties claiming under the seller, for a recovery of the property, the possession of which had been forcibly obtained by the seller after the sale, and by him transferred to the defendants, that he was estopped from denying that, at the time of the sale, he held the legal title to the interest which he sold ; and that this estoppel was binding on the defendants.

6. *Verdict ; form of may be corrected by the court.*—While the court can not dictate to a jury the verdict they should return, it may, after the verdict has been returned, direct them to put it in proper form, and, to this end, may instruct them as to what that form should be.

7. *Detinue ; time when value of property to be assessed.*—In detinue, the jury may assess the value of the property taken at any time between the wrongful taking and the trial.

8. *Same ; rule for assessment of damages.*—The damages required to be assessed in detinue for the detention of the property, includes any deterioration in the value of the property, occasioned by the fault of the wrongdoer, through neglect, abuse or non-use, during the time of its detention.

9. *Detinue by wife to recover statutory estate ; right of recovery not affected by removal from the State.*—In detinue by a married woman, to recover property belonging to the *corpus* of her statutory separate estate, her right of recovery is not affected by the fact, that, at the time the suit was commenced, she and her husband had removed from, and were non-residents of the State.

APPEAL from Madison Circuit Court.

Tried before Hon. H. C. SPEAKE.

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[Wortham v. Gurley.]

This was an action of detinue, brought by Frank B. Gurley and Emma H. Stewart against Larkin A. Wortham and others; and it was commenced on 26th May, 1874. The defendants pleaded, "in short by consent, the general issue, with leave to give in evidence any matter which, if specially pleaded, would be a good plea in bar." The cause was tried in February, 1882, the trial resulting in a verdict and judgment for the plaintiffs. As shown by the evidence, Emma H. Stewart was, in and prior to the year 1873, and at the time of the trial, a married woman, the wife of B. R. Stewart; but the fact of coverture is not disclosed by the complaint.

The evidence introduced on behalf of the plaintiffs tended to show that, in the fall of the year 1873, B. R. Stewart purchased the property in controversy from Frank B. Gurley; not for himself, however, but for his wife, or for the firm of Hewlet & Co., of which, as she claimed, and as the plaintiffs' evidence tended to show, she was a member; but whether he purchased for her individually, and she afterwards sold to the firm, or for the firm in the first instance, is not clear; that said property went into, and continued in the possession of Thomas G. Hewlet, of said firm, and was by him used and operated, for and on behalf of the firm, for two or three months, when he, with the knowledge and consent of Mrs. Stewart, sold his interest therein to Frank B. Gurley, who was, in pursuance of the sale, placed in possession of the property by Hewlet; that said Gurley, for himself and Mrs. Stewart, held possession of said property, using and operating it, for about twenty days, when Hewlet forcibly took possession of it in the night-time, and afterwards conveyed it to the defendants, who were his creditors, and who were in possession when this suit was brought. The evidence also showed that the contract of purchase under which Hewlet & Co. claimed title was not in writing; and that after such purchase, but prior to the institution of this suit, Mrs. Hewlet and her husband went to Arkansas; whether they went there with the intention of returning, or with the purpose of changing their domicile to that State, is not clear; the evidence being in conflict on that point. The defendants' evidence tended to show, *inter alia*, that Mrs. Stewart was never a member of the firm of Hewlet & Co., but that her husband was; and that she had no interest in the property sought to be recovered in this action.

Among other things, the court charged the jury, *ex mero motu*, "that the coverture of the plaintiff, Emma H. Stewart, could only be interposed as a defense by plea in abatement duly verified; and that although they might find from the evidence, that, at the institution of this suit, she was the wife of B. R. Stewart, and that her estate in the property sued for in this

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action was her common law or equitable estate, this defense would not be available to the defendant under the general issue." The court gave the following charges at the plaintiffs' written request: (1) "If the jury believe from the evidence, that Stewart purchased the property from Gurley, as the agent for his wife, and on her account, and at the date of such purchase, and when this suit was brought, Stewart and his wife were citizens of the State of Alabama, although they may have been, when this suit was brought, in Arkansas; and, at the time Hewlet took possession of the property [from Gurley], Gurley was in actual possession, holding and operating it for himself, and as the agent of Mrs. Stewart, and that Hewlet so took and thereafter held possession without the consent of the plaintiffs; and that Hewlet, before so taking possession, had sold his interest to Gurley, and had received from Gurley his written obligation, and delivered possession of the property to Gurley, in pursuance of the sale to him: and that Hewlet, while so in possession, sold and delivered possession of the property to the defendants before the institution of this suit, and they thereafter held it as their property under said purchase from Hewlet, without the consent of the plaintiffs, then such possession by the defendants would be unlawful, and the jury would be authorized to find for the plaintiffs." (2) "The jury are not limited to any precise point of time in fixing the value of the property, but may locate it at any time between the commencement of the unlawful detention and the trial." (3) "It is for the jury to determine, from all the evidence in the case, the value of the property and the damages to be awarded the plaintiffs for its unlawful detention; and in estimating such damages, the proper basis is the value of the use or hire of the property during its detention, and the deterioration in the value of such property from neglect, abuse or non-use." The court refused to give the following, among other charges requested in writing by the defendants: (1) "If the jury find from the evidence, that the property sued for was sold by Frank B. Gurley to the plaintiff, Emma H. Stewart, in such manner as to create a statutory separate estate, then the said Emma H. Stewart could only part with her interest, or any part thereof, in said property by instrument in writing, signed by her and her husband, B. R. Stewart, and attested by two witnesses; and if they further find that she did not so sell and convey or transfer a one-half interest to Thomas G. Hewlet by such instrument, then her transfer to said Hewlet would be void, and Hewlet's subsequent sale, if he made one, to Frank B. Gurley, would convey no interest to him, and their verdict must be for the defendants." (2) "So, if Gurley transferred the entire property to Mrs. Stewart as a statutory separate



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estate, and if he received his title from her through Hewlet, and such title was not transferred by a written instrument attested by two witnesses, Gurley has no title, and the jury must find for the defendants." (3) In substance, that if the jury find from the evidence, that the property sued for was purchased by B. R. Stewart of Frank B. Gurley for Emma H. Stewart, his wife, and that the same was a gift from Stewart to his wife, then it would be an equitable estate; and if an equitable estate, and the husband had possession at any time during coverture, then he alone could sue for the wife's interest in said property, and if he did not so have possession, and it was her equitable separate estate, then the husband and wife should sue jointly; and, in either event, the jury must find for the defendants. (4) "If the jury find from the evidence, that at the beginning of this suit B. R. Stewart and his wife, Emma H. Stewart, resided in Arkansas, then their verdict must be for the defendants." (5) "If the jury believe all the evidence in this case, they must find a verdict for the defendants." To the charges given, and to the refusal of the court to charge as requested the defendants excepted.

The jury, after considering the issues submitted to them for several hours, returned a verdict for the plaintiffs, and assessed "their damages at \$2000." The presiding judge having told the jury that their verdict was not in form, and having charged them, against the defendants' objection, "as to the proper form of a verdict," the jury again retired to the jury-room. "After the lapse of a few minutes, the plaintiffs moved the court to send a form of verdict to the jury in their room. The court, against the defendants' objection, sent the following form of verdict to the jury-room, and the same was delivered to the jury, to-wit: 'We, the jury, find for the plaintiffs, and assess the value of the property sued for as follows, viz: ———, when taken on the 20th day of January, 1884, at ——— dollars; and assess the damages on the above enumerated property from rust and non-use at ——— dollars. We further assess the plaintiffs' damages for the detention of the property sued for as follows, viz, at ——— dollars, for the hire of the property from January 21st, 1874, up to the 21st day of February, 1882, interest included.' The defendants excepted to the granting of said motion, and also to the action of the court in sending said form of verdict to the jury." The jury afterwards returned a verdict for the plaintiffs, following the above form.

The rulings above noted are among the assignments of error here made.

WALKER & SHELBY, for appellants.

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HUMES, GORDON & SHEFFEY, *contra*.

SOMERVILLE, J.—The action is one of *detinue*, instituted by the appellees, Gurley and Mrs. Emma Stewart, as co-plaintiffs, for sundry articles of personal property appurtenant to the machinery of a saw-mill, claimed by the appellants, who were defendants in the court below.

Mrs. Stewart, one of the plaintiffs, is shown by the evidence to be a married woman, whose husband was still living at the time of the commencement of the suit. The nature of her estate in the property sued for—whether an equitable or a statutory separate estate—is important in determining the question raised as to whether the husband was a necessary party plaintiff. We can discover no evidence in the record which would tend to show in her any other than a *statutory* separate estate. It is shown that her husband purchased the property from Gurley, who was the original owner, and who is now one of the plaintiffs in the action, claiming to be a half owner, or tenant in common with the wife. Whether Stewart purchased for the exclusive benefit of his wife, and as her agent, or for the benefit of the partnership of Hewlet & Co., of which it is claimed Mrs. Stewart was a member, the nature of the wife's estate would be statutory—one created by the statute,—which comprehends all estates acquired in any manner, except such as are rescued from the operation of the provisions of the Constitution and the Code by being made separate by contract of the parties. This can be done only by words indicating an intention to exclude the marital rights of the husband, or by a gift or conveyance made by the husband *directly* to the wife. A purchase from a third person, in the name, or for the benefit of the wife, is insufficient for this purpose, although the husband may furnish the consideration from his own means as a gratuity.—*Williams v. Williams*, 68 Ala. 405; *Harris v. Harris*, 71 Ala. 436; *Cahalan v. Monroe, Smaltz & Co.*, 70 Ala. 271; Code, 1876, § 2705; Const. 1875, Art. x, § 6; *Lehman v. Meyer*, 67 Ala. 396.

Admitting that the defendant could raise the question of the husband's non-joinder as plaintiff under the general issue, and without a special plea of Mrs. Stewart's coverture, pleaded by way of abatement—a point unnecessary to be decided,—it is obvious that the husband was not a proper party plaintiff. The action relates to the *corpus* of the statutory separate estate of Mrs. Stewart—if she had any estate at all in the property sued for,—and was properly brought in the name of the wife alone, without joining her husband as a co-plaintiff.—*Hurst v. Thompson*, 68 Ala. 560; *Pickens v. Oliver*, 29 Ala. 528; Code, 1876, § 2892.

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It is objected that the plaintiff Gurley shows no title to the property in controversy, such as will authorize a recovery by him, and that if he be debarred from recovery, his co-plaintiff is also debarred. It would be a sufficient answer to this to say, that the evidence tends to show that Gurley was in actual possession of these articles of property, and of the premises upon which they were situated, claiming them as the property of himself and Mrs. Stewart by purchase and peaceable tenure, and that Hewlet, under whom the defendants claim, entered upon the premises by force and took possession of the property as a wrongdoer. In such a case, the action of detinue, like that of trover, may be maintained without proof of any general or special property in the goods claimed. The mere possession of the plaintiffs was sufficient evidence of title as against a trespasser or wrongdoer.—*Huddleston v. Huey*, 73 Ala. 215.

There is no pretense that Gurley held possession for himself alone, but for the joint benefit of himself and Mrs. Stewart, in full recognition of her rights as his co-tenant. His possession was, therefore, hers, on the familiar principle that the possession of one tenant in common is also that of his co-tenant.

And the rule that the possession of personal property is *prima facie* evidence of title, or ownership, applies as well to property belonging to the wife as to that owned by any other person. The possession of her property by the husband, or by herself and husband jointly, when it is shown to be her statutory separate estate, is her possession, he being presumed to hold merely in his capacity of statutory trustee, with powers specially defined and strictly limited.—*Patterson v. Kicker*, 72 Ala. 406; *Brunson v. Brooks*, 68 Ala. 249.

But apart from this view, there is another which seems conclusive. When Hewlet was in possession of this property, under the purchase from Gurley, he held it for the firm of Hewlet & Co. He asserted claim to an undivided half interest in it, as one of the partners. When he sold it back to Gurley, he did so upon the representation that he was joint owner, having title to such interest. Gurley bought on the faith of this representation, and parted with value in the belief of its asserted truth. Hewlet, therefore, by his sale to Gurley, having affirmed that he had title, and thereby induced the purchase, can not now be permitted to assert the contrary to the prejudice of one whom he has misled by his deceit. It can avail him nothing in this suit, that he had no good title to the undivided half interest which he claimed, by reason of Mrs. Stewart's failure to execute to him a legal conveyance of her statutory separate estate. There is a clear estoppel, operating to preclude him from denying the truth of his former affirmation. Force is added to this view by the fact that nowhere in this



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record does Mrs. Stewart undertake to assail the legal sufficiency of the alleged sale made by her of an undivided half interest in this property to Hewlet. By uniting as co-plaintiff with Gurley, in this action, she, on the contrary, solemnly affirms its validity. Hewlet, therefore, can not assail it. As we have said, he is estopped by his previous conduct, and this estoppel binds the defendants, who are his privies in estate, and whose possession, derived from him through his tortious seizure, is equally wrongful with his own.

There was nothing objectionable in the action of the court putting the verdict of the jury in proper form after they had returned it. There was no change in the amount of recovery, or in the substance of the verdict, which remained unaltered. It was a correction in form only.—*Ewing v. Sanford*, 21 Ala. 157; *Hughes v. The State*, 12 Ala. 458. There is an obvious difference between dictating the substance of a verdict to a jury before they retire for deliberation, and merely correcting the form of a verdict after its rendition in open court.

The rule declared by the court as to the proper measure of damages was free from error. In detinue, as in trover, it is permissible for the jury to assess the value of the property taken at any time between the date of the tort and the trial. Otherwise a *tortfeasor* might often reap pecuniary profit from his own wrongful act by a mere retention of the property sued for after judgment against him.—*Johnson v. Marshall*, 34 Ala. 522; *Holly v. Flournoy*, 54 Ala. 99.

In our opinion the court also properly instructed the jury, that the damages required to be assessed for the detention of the property included any *deterioration* in its value occasioned by the fault of the wrongdoer, through neglect, abuse, or non-use, during the period of detention. This injury is shown to have resulted from the tortious act of seizure and detention as its natural and proximate cause, and was a legitimate element of damage in addition to the value of rent or hire. This is the rule adopted in *Freer v. Cowles*, 44 Ala. 314, and is generally supported by authority.—*Allen v. Fox*, 51 N. Y. 562; *Zitzke v. Goldberg*, 38 Wis. 216; 2 Sedgw. Dam. (7th Ed.) 424, note a. The rule, as observed by Mr. Sutherland in his recent work on damages, does not include any compensation for the wear and depreciation *naturally* consequent upon the use of the property; but “if the defendant, by his wrongful conduct, has deteriorated the property, or a loss on its value has proximately and with certainty resulted from the wrongful detention, that should be recovered for, in addition to the value, in order to give the owner full indemnity.”—3 Suth. Dam. pp. 546, 541, 547. This we deem to be the correct rule, and a proper construction of the statute, which requires the jury to

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assess not only the value of the property, but "damages for its detention."—Code 1876, § 2944. The mere recovery of the property, in its depreciated condition, which the plaintiff has no option to refuse, with the value of its hire or rent during detention, would manifestly be incommensurate with the rule of adequate compensation, which is a fundamental principle in the law of damages.

The question of parties to this action can not be affected by the fact, that Mrs. Stewart and her husband may have become non-residents of Alabama at the time it was commenced. The wife was resident here when she acquired title to the property. It was her statutory separate estate, created by the laws of Alabama, operating upon a contract of sale made in this State. No law of any foreign State or jurisdiction could influence it. The law of this State—the *lex fori*—must govern under these circumstances as to all forms of remedies and modes of proceeding adopted in legal actions pertaining to it.—*King v. Martin*, 67 Ala. 177; *Story's Conf. L.*, § 556; *Judge v. Wright*, 73 Ala. 324; 3 *Parson's Contr.* \*588.

The rulings of the circuit court present no errors prejudicial to the appellants, and the judgment must be affirmed.

## Seals v. Robinson & Co.

### *Bill in Equity to set aside Conveyance of Land as Fraudulent and Void.*

1. *Bill in equity; rule of pleading.*—It is a cardinal rule of equity pleading under the statute, as it was prior to its enactment, that the bill must show by direct and positive averments, with clearness and accuracy, all matters essential to the complainant's right to relief; they must not be made to depend upon inference, nor will averments of them which are ambiguous, uncertain and inconclusive, be accepted as sufficient.

2. *Bill in double aspect; when defect not reached by motion to dismiss or general demurrer.*—While a bill in equity framed in a double aspect is demurrable, if either aspect is insufficient to support the right of complainant to relief, advantage of the defect must be taken by demurrer specifying the ground of objection, and affording complainant an opportunity of removing it by amendment; advantage of it can not be taken by motion to dismiss for want of equity, or by general demurrer.

3. *Motion to dismiss bill for want of equity; its office.*—A motion to dismiss a bill for want of equity is not the equivalent of a demurrer, and is not appropriate to reach mere defects or insufficiencies of pleading curable by amendment; but it should be entertained only when, admitting the facts apparent on the face of the bill, whether well or illy pleaded, the complainant is without right to equitable relief.

4. *Objections to evidence in equity; practice in reference to.*—In chan-

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cery, objections to the admissibility of evidence ought to be reduced to writing, and a reference to them should be incorporated in the note of submission, or they should otherwise be called directly to the chancellor's attention; and if this is not done, and the chancellor fails to notice them, the presumption is indulged that they were waived.

5. *Voluntary conveyance; when infected with actual fraud, may be attacked by creditors, existing or subsequent.*—A voluntary conveyance is valid and operative as to subsequent creditors, if it be not shown that there was *mala fides* or fraud in fact in the transaction; but, if actual fraud is shown, whether directed against existing or subsequent creditors, either class can successfully impeach and defeat it, so far as it affects the right to satisfaction of their debts.

6. *Same; proof of fraud.*—When a voluntary conveyance is attacked for actual fraud by a subsequent creditor of the grantor, the general rule applies, that fraud will not be presumed, but must be proved; and the burden of its proof is on the complainant; but the rule does not require that the fraud must be proved by direct and positive evidence; it may be shown by circumstances leading to a rational, well founded conviction of its existence.

7. *Conveyance of husband to wife; estate created by.*—As a direct gift or conveyance by the husband to the wife is valid only in a court of equity, it is regarded as creating in the wife an equitable separate estate, although it does not contain words in exclusion of the husband's marital rights; and hence, the estate thereby created is not within the influence or operation of the statutes enabling the wife to take and hold property owned by her at the time of marriage, or by her subsequently acquired.

8. *Voluntary conveyance by husband to wife; badges of fraud on attack by subsequent creditor.*—When a voluntary conveyance, executed by the husband to his wife, is attacked for actual fraud, the extent and value of the property conveyed, its kind and character, are all facts to be considered in determining whether the transaction is infected with a covinous intent; and the fact that by the deed the husband strips himself of all visible, tangible property subject to execution at law, retaining only choses in action of uncertain, doubtful value, while not in itself conclusive, but, it may be, weak and inconclusive evidence of fraud, will awaken suspicion, and add strength to other circumstances which may also be, in themselves, insufficient to establish a fraudulent intent.

9. *Same; intent of donor must prevail on attack for actual fraud.* In such case, the wife being a mere volunteer, and having no equity which will protect her against the rights of creditors, it is not her intent in accepting the conveyance, but the intent of the husband in executing it, which is material; his fraud being visited upon her, though she may be *doli incapax*, or her intentions may be fair and honest.

10. *Same; attempt to create a statutory estate in wife a badge of fraud.* A provision in such conveyance, that the wife shall hold the property conveyed "as her separate property under the statutes of the State governing the estates of married women," although it may not be valid as a limitation upon the estate conveyed, creating in her a statutory estate, is indicative of an intention on his part to do so, and thereby vest in himself, under the statute, the property conveyed, as husband and trustee for his wife, entitling him to the rents and profits so long as he continues in that relation, freed from liability for his debts; and hence, on an attack of the conveyance for actual fraud by a subsequent creditor, it is a material fact, tending to show a covinous intent on the part of the husband in the execution of the conveyance.

11. *Same; failure to record as evidence of fraud.*—While the omission to have such conveyance recorded for six months after its execution, the husband remaining in possession, claiming ownership of the property, and vouching the ownership as entitling him to credit, and upon the



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faith of it obtaining credit, is but a fact or circumstance indicative of fraud, and is open to explanation, which, if just and reasonable, would neutralize all unfavorable influences that might be drawn from it, yet, ignorance, on the part of the wife, of the necessity for registration, is ignorance of the law, which can not be accepted as explanatory of the omission, especially when she knew that her husband, after the execution of the conveyance, and before its registration, embarked in a new mercantile enterprise, contracting debts to a large amount.

12. *Same; badges of fraud; when will authorize impeachment by subsequent creditor.*—The omission to register such conveyance, the want of notoriety of its existence, the magnitude of the property conveyed, when compared with the value of that which was retained, the attempted reservation of a specific benefit to the donor, which he could hold free from liability for debts, his engagement in business very soon after the execution of the conveyance, obtaining a false credit because of his possession, and of representations of ownership of the property conveyed, to which the donee by her supineness, at least, contributed, are all badges of fraud, indicative that the donor's intent was the hinderance, delay and fraud of creditors, which will authorize a subsequent creditor of the grantor to successfully attack the conveyance, whether the fraudulent intent was directed against existing or subsequent creditors.

#### APPEAL from Pike Chancery Court.

Heard before Hon. JOHN A. FOSTER.

This was a bill in equity by J. M. Robinson & Co., a mercantile partnership, carrying on business in Louisville, Kentucky, simple contract creditors of S. J. Seals, against the said Seals, R. C. Seals, his wife, and W. A. Weldon, seeking to have vacated and set aside, as fraudulent and void, a deed executed by S. J. Seals to his wife, bearing date 17th June, 1881, and conveying to her several lots of land, situate in the city of Troy, in this State; and to have the property conveyed by the deed sold for the payment of complainants' demand; and it was filed on 20th February, 1882. As appears from the averments of the bill, and from the proof, the complainants sold S. J. Seals, on 29th and 30th days of September, 1881, goods, wares and merchandise, amounting in price to nearly one thousand dollars, on credit, and without security, the debt maturing at two and four months; on which was paid, on 24th November, 1881, the sum of two hundred dollars. The bill alleges: "That at the time said purchases were made, the said S. J. Seals held and owned in his own name and right a large amount of real estate and personal property, of great value, to-wit, eight or ten thousand dollars, consisting of valuable brick storehouses in the city of Troy, and dwellings and lots in said city, and stock in trade and choses in action, as represented by him, of the value of four thousand dollars; and that upon the faith of said real and personal property, so owned by him and held and standing in the name of said S. J. Seals, in his own right as aforesaid, your orators were induced to sell and credit and trust said S. J. Seals, and sell and deliver to him goods, wares and

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merchandise upon the credit aforesaid. Orators further aver that, at the time the said S. J. Seals made the purchases aforesaid, he had himself reported in commercial circles as being worth, over and above all liabilities, in his own right, twelve thousand dollars; and through these representations, and his property aforesaid, he was enabled to obtain credit and to be trusted." It is then averred that on 9th January, 1882, the said S. J. Seals filed in the office of the judge of probate of said county, for record, the deed in question, which is made an exhibit to the bill. The consideration expressed in the deed is the natural love and affection which the grantor had and bore towards his wife, the grantee, and the property is conveyed to her in fee simple, to have and to hold "as her separate property under the statutes of the State governing the estates of married women." After averring the execution by S. J. Seals, on 17th February, 1882, of an assignment of all his property, then owned by him, to W. A. Weldon, his father-in-law, as assignee or trustee for the benefit of his creditors, the bill proceeds: "Your orators further represent to your Honor, and aver the fact so to be, that the said deed made by said Seals to his said wife, R. C. Seals, was not executed on the 17th day of June, 1881, but was executed some time after that date, to-wit, about the 9th day of January, 1882. But orators aver that if they are mistaken in this, then they aver that said deed was not delivered on said day, and was never in fact delivered until the 9th day of January, 1882, when the same became, for the first time, a matter of record."

It is also averred that said deed was without valuable consideration; that at the time of its execution, the said S. J. Seals was financially embarrassed and in failing circumstances, which was known to his wife; that it was executed and delivered by him with the intention, and for the purpose of hindering, delaying and defrauding the complainants and his other creditors; and that such fraudulent intention and purpose were known to his wife, and the deed was accepted by her in furtherance thereof. The bill then contains this averment: "And plaintiffs aver that if said deed [was executed and delivered] at the time it purports to have been executed and delivered, there was a secret understanding and agreement between the said Seals and his wife, that the same should not become a matter of record at said time; and so far as the existence of the said deed was concerned, the whole commercial world was kept in blissful ignorance thereof, until the said Seals had purchased all the goods he wanted, amounting to several thousand dollars [in value], and had disposed of the same; and then, for the first time, it came to light, after the same had been concealed from your orators, and all persons, for the period of nearly seven

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whole months; and all this time the said Seals, his wife consenting thereto, was holding himself out to the world as the owner, in his own right, of said property, for the purpose of defrauding his creditors, and those with whom he might afterwards deal on credit and trust." It is also charged that the deed is fraudulent, as to prior and subsequent creditors, in that said Seals "had a reservation therein in favor of himself, being the trustee of his said wife, to control and enjoy the rents of said property, without accounting to any one for the same." The bill was subsequently amended, averring the death of S. J. Seals after the filing of the original bill, and making his administrator a party defendant.

To the bill as amended Mrs. Seals and W. A. Weldon filed a demurrer, the character of which is stated in the opinion. The demurrer was overruled, and the defendants answered. Mrs. Seals, in her answer, which was not under oath, averred, and testimony introduced on her behalf tended to show, that the deed in question was executed and delivered at or about the time it bore date, for the *bona fide* purpose, on the part of herself and husband, of making a provision for her and three children, minors of tender years, her husband being induced thereto by bad health, and an apprehension of an early death from a chronic disease with which he was then afflicted, and also a desire to avoid an administration upon his estate; and that she did not have the deed recorded at an earlier date, because she was not advised of the necessity of registration, and was finally induced to have it recorded by a suggestion from a third party, that the record would be proof of its contents in the event of a loss. She admitted that her husband owed debts at the time of the execution of the deed, but denied that he was then financially embarrassed, and also the averments of the bill charging fraud.

The material facts and circumstances disclosed by the evidence for the complainants, on which they relied to sustain the averments of fraud contained in the bill, are sufficiently indicated in the opinion. There was no direct or positive evidence introduced by them, that the wife had any knowledge of the husband's financially embarrassed condition when the deed was executed, or of his intention to hinder, delay and defraud his creditors, or of any other fraudulent intention or purpose on his part; or that she combined and conspired with him for the purpose of perpetrating any fraud; or that she withheld the deed from record for any fraudulent purpose.

On the hearing, had on pleadings and proof, and on a motion to dismiss the bill for want of equity, the chancellor caused a decree to be entered, overruling the motion, declaring the deed fraudulent and void, and granting relief to the complain-



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ants. The decree also overrules "the exceptions to the testimony;" but the record fails to disclose these exceptions, or their nature or extent.

The rulings of the court, in overruling the demurrer, the motion to dismiss, and the exceptions to testimony, and in granting relief to the complainants, are here assigned as error.

M. N. CARLISLE, for appellants.

N. W. GRIFFIN, *contra*.

BRICKELL, C. J.—The rules of pleading in a court of equity, as to matters of form, are not so strict as the rules originally prevailing in courts of common law. The statutory requirement in reference to bills in equity is, that they "must contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition, and conclude with a prayer for the appropriate relief." A bill conforming to this requirement, under the practice and the decisions of this court, would have been deemed unobjectionable before the enactment of the statute. The statute has not, however, been construed as in derogation of the *cardinal rule*, as it has been frequently termed, that the bill must show with accuracy and clearness all matters essential to the complainant's right to relief. These matters must not be made to depend upon inference, nor will ambiguous averments of them be accepted as sufficient. The averments must be direct and positive, not uncertain and inconclusive.—*Spence v. Duren*, 3 Ala. 251; *Cockrell v. Gurley*, 26 Ala. 405; *Duckworth v. Duckworth*, 35 Ala. 70. A bill may be framed in a double aspect; alternative averments may be introduced; but each alternative must present a case entitling the complainant to the same relief. The bill is demurrable, if in either alternative the complainant is not entitled to any relief, or is entitled to relief essentially differing in character.—*Andrews v. McCoy*, 8 Ala. 920; *Lucas v. Oliver*, 34 Ala. 626; *Rives v. Walthall*, 38 Ala. 329; *David v. Shepard*, 40 Ala. 587; *Micon v. Ashurst*, 55 Ala. 607.

If the original bill contains alternative averments, and either averment is insufficient to support the right of the complainant to the relief prayed, the objection was not presented in the chancery court by demurrer. Advantage of it was claimed only by motion to dismiss for want of equity. A motion to dismiss for want of equity is not the equivalent of a demurrer; nor is it appropriate to reach mere defects or insufficiencies of pleading curable by amendment, which is matter of right at any time before final decree. It should be entertained only when, admitting the facts apparent on the face

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of the bill, whether well or illy pleaded, the complainant is without right to equitable relief. When it is apparent, if the facts were well pleaded, a case for relief would exist, the defendant should be put to a demurrer, specifying the grounds of objection, affording the complainant the opportunity of removing them by amendment.—*Hooper v. S. & M. R. R. Co.*, 63 Ala. 529. The demurrer interposed was general; it fails, in the words of the statute, “to set forth the grounds,” and the statute prohibits the hearing of it.—*Hart v. Clark*, 54 Ala. 490.

Objections to the admissibility of evidence, in chancery, ought to be reduced to writing, and a reference to them should be incorporated in the note of submission, or they should be otherwise called directly to the attention of the chancellor. If the fact that they have been made is not noted in the submission, or it is not otherwise shown that they were called to the attention of the chancellor, and he does not notice them, on appeal, the presumption is that they were waived.

It is settled by a long line of decisions in this court, that a voluntary conveyance, a conveyance not resting upon a valuable consideration, is void *per se*, without any regard to the intention of the parties, however free from covin or guile they may have been, as to the existing creditors of the donor, without regard to his circumstances, or the amount of his indebtedness, or of the kind, value or extent of the property conveyed, if it be not exempt from liability for the payment of debts. As to subsequent creditors, if it be not shown that there was *mala fides*, or fraud in fact in the transaction, the conveyance is valid and operative. But if actual fraud is shown, it is not of importance whether it was directed against existing or subsequent creditors; either can successfully impeach and defeat the conveyance, so far as it breaks in upon the right to satisfaction of their debts. The distinction between existing and subsequent creditors is, that, as to the former, the conveyance is void *per se*, for the want of a valuable consideration; as to the latter, because it is infected with actual fraud.—*Miller v. Thompson*, 3 Port. 196; *Cato v. Easley*, 2 Stew. 214; *Moore v. Spence*, 6 Ala. 506; *Costillo v. Thompson*, 9 Ala. 937; *Thomas v. DeGraffenreid*, 17 Ala. 602; *Foote v. Cobb*, 18 Ala. 585; *Stokes v. Jones*, *Ib.* 734; s. c. 21 Ala. 731; *Gannard v. Eslava*, 20 Ala. 732; *Randall v. Lang*, 23 Ala. 751; *Stiles v. Lightfoot*, 26 Ala. 443; *Huggins v. Perrine*, 30 Ala. 396; *Cole v. Varner*, 31 Ala. 244; *Pinkston v. McLemore*, *Ib.* 308; *Williams v. Avery*, 38 Ala. 115. The right of the subsequent creditor depends upon the existence of actual fraud in the transaction; the burden of proving it rests upon him.—Bump on Fraud. Con. 308. The general rule applies, that fraud must be

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proved ; it will not be presumed, if the facts and circumstances shown in evidence may consist with honesty and purity of intention. But it must not be supposed that fraud must be proved by direct and positive evidence, or that it is incapable of proof by circumstances leading to a rational, well grounded conviction of its existence. There is no fact which may be the subject of controversy in a judicial proceeding, civil or criminal, that is not the subject of proof by circumstantial, as distinguished from positive or direct evidence. As the fraud vitiating a transaction at the instance of creditors lies in the intention of the parties to it, vicious intent is not generally susceptible of proof otherwise than by evidence of circumstances indicative of it. The intention is a mental emotion, of which the external signs are the acts and declarations of the parties, taken in connection with the concomitant circumstances.—*Hubbard v. Allen*, 59 Ala. 283 ; *Harrell v. Mitchell*, 61 Ala. 270 ; *Thames v. Rembert*, 63 Ala. 561 ; *Pickett v. Pipkin*, 64 Ala. 520.

The conveyance now assailed by subsequent creditors of the grantor is of real estate, is purely voluntary, founded upon no other consideration than love and affection, and the controlling purpose of its execution was a provision for the wife of the donor. It is made directly to the wife, without the interposition of a trustee, and at law is a mere nullity. All contracts and conveyances made between husband and wife directly, at common law, are invalid, for the reason that husband and wife are regarded as but one person, and the legal existence of the wife is merged in that of the husband.—*Gamble v. Gamble*, 11 Ala. 966 ; *Purvey v. Purvey*, 12 Ala. 13 ; *Bradford v. Goldsborough*, 15 Ala. 311 ; *Frierson v. Frierson*, 21 Ala. 549. The statutes creating and defining the separate estates of married women are not in abrogation of this doctrine of the common law ; they are not intended to sever the unity of the husband and wife, so far as to confer on them capacity to contract with, or to convey directly to each other.—*Short v. Battle*, 52 Ala. 456 ; *McMillan v. Peacock*, 57 Ala. 127. Although this is the recognized doctrine of the common law, a court of equity, when the contract or conveyance is fair and just, will give to it full effect and validity.—*Williams v. Maull*, 20 Ala. 721 ; *Williams v. Avery*, 38 Ala. 115 ; *McWilliams v. Ramsey*, 23 Ala. 813 ; *Andrews v. Andrews*, 28 Ala. 432 ; *Spencer v. Godwin*, 30 Ala. 355. As a gift or conveyance by the husband to the wife directly is invalid at law, and is valid only in a court of equity, it is regarded as creating in the wife an equitable separate estate, though it may not contain words denoting that it is for her sole and separate use, or words in exclusion of the marital rights of the husband ; and that the estate is not consequently within the influence or operation of the statutes



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enabling the wife to take and hold the property owned by her at the time of the marriage, or to which she may become entitled subsequently.—*McMillan v. Peacock*, *supra*; *Ratcliffe v. Dougherty*, 24 Miss. 181; *Warren v. Brown*, 25 Miss. 66; *Short v. Battle*, *supra*.

The conveyance is of all the visible, tangible property of the donor, subject to execution at law. All that he retained, consisted of choses in action, of uncertain, doubtful value. It is said by Judge Story that, "if a husband should by deed grant all his estate or property to his wife, the deed would be held inoperative in equity, as it would be in law; for it could, in no just sense, be deemed a reasonable provision for her (which is all that courts of equity hold the wife entitled to); and, in giving her the whole, he would surrender all his own interests." 2 Story's Eq. § 1374. In *Coates v. Gerlach*, 44 Penn. St. 46, the court said: "A conveyance that denudes a husband of all, or the greater part of his property, is much more than a reasonable provision for a wife; for in considering what is, and what is not a reasonable provision, the circumstances of the husband are to be regarded, his probable necessities as well as his debts. Equity will not assist a wife to impoverish her husband." Whether a court of equity would refuse to enforce this conveyance upon the ground that the provision for the wife is unreasonable, and that giving to it effect would work injustice to the husband, it is not necessary to consider. The circumstances of each case must be considered as determining the reasonableness of a provision for wife or children, and a conveyance may be valid *inter partes*, which the court would not hesitate to pronounce fraudulent as to creditors.—*Jones v. Obenchain*, 10 Gratt. 259; 1 Bish. on Mar. Women, § 755. When the rights of creditors are involved, the extent and value of the property conveyed, its kind and character, are all facts to be considered in determining whether the transaction is infected with a covinous intent. The fact that a donor strips himself of all visible, tangible property which is subject to execution at law, retaining only choses in action of uncertain, doubtful value, may not be conclusive proof of fraud; taken alone it may be weak and inconclusive; but it will awaken suspicion and add strength to other circumstances which may in themselves be also insufficient to prove that his intent was fraudulent. And it is his intent, not the intent of the donee, which is material; the fraud of the donor is visited upon the donee, though he may be *doli incapax*, or though his intentions may be fair and honest, for he comes in as a volunteer, and has no equity which will protect him against the rights of creditors.—*Pickett v. Pipkin*, 64 Ala. 520.

The conveyance is not only of all visible property of the

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donor subject to execution at law, the value of which far exceeds the highest estimate of the value of the choses in action he retained, but it contains the unusual, if not remarkable provision, that the donee shall hold the property conveyed "as her separate property under the statutes of the State governing the estates of married women." The effect which would be given this clause of the conveyance, or whether it is capable of being construed as limiting and qualifying the estate, narrowing its incidents, lessening the dominion of the donee, as the estate is created by the general words which precede it, is not now of importance. Whether it is, or is not valid and qualifying as a limitation, subjecting the estate and the wife's dominion to the properties of a statutory estate, which is, in but a limited sense, a separate estate, it is indicative of the intention of the donor; and that intention is, in one aspect, now of the highest importance. Subjecting the estate to the statute would vest it in the donor as husband and trustee for the donee, entitling him to its rents and profits, so long as he continues in that relation, freed from liability to account to the donee, and exempt from liability for his debts. In other words, he does not part with the property absolutely, but reserves to himself a specific benefit which it is to yield, though the ownership is vested in the donee.

Another circumstance it is of importance to consider. More than six months passed after the execution of the conveyance before its registration. Whatever may have been the general circumstances of the donor at the time of the execution of the conveyance, and upon this point the evidence is not so clear and satisfactory as it could probably have been made, the fact is, that when the conveyance was delivered to the judge of probate for registration, he was insolvent, and, in but little more than a month thereafter, made a general assignment for the benefit of creditors. During the interval between the execution and registration of the conveyance, he continued in possession, claiming ownership of the property, vouching the ownership as entitling him to credit, and upon the faith of it obtained credit. The omission to register the conveyance is but a fact or circumstance indicative of fraud, and is open to explanation, which, if just and reasonable, would neutralize all unfavorable inferences that may be drawn from it. The only explanation now offered is, that the donee was ignorant of the necessity for registration; ignorant that the law required registration to protect her from the claims of subsequent purchasers from the husband, or from the claims of judgment creditors. This is ignorance of law, which can not be accepted as explanatory of the omission. But she was not ignorant that the husband, after the execution of the conveyance, and before

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its registration, embarked in a new mercantile enterprise, contracting debts to a large amount. Nor is ignorance of the necessity of registration, or of the duty of giving publicity to the fact that he was not the owner of the property, imputed to him. The evidence is conclusive that he concealed the fact of the conveyance, and represented himself as having title.

The omission to register the conveyance, the want of notoriety of its existence, the magnitude of the property conveyed, when compared with the value of that which was retained, the attempted reservation of a specific benefit to the donor, which he could hold free from liability for debts, his engagement in business very soon after the execution of the conveyance, obtaining a false credit because of his possession and representations that he was the owner of the property, to which, to say the least, the donee by her supineness contributed, are all badges of fraud, or circumstances indicative that the intent of the donor was the hinderance, delay, and fraud of creditors. Bump on Fraud. Con. 308. It is not of importance, whether the intent was directed against present or subsequent creditors; in either event, the conveyance may be successfully impeached by a subsequent creditor. We concur in the conclusion of the chancellor, that the conveyance must be deemed fraudulent as to creditors, prior or subsequent, and the decree is of consequence affirmed.

## Clark, Adm'r, v. Head, Adm'r ad litem.

### *Final Settlement of Insolvent Estate in Probate Court.*

1. *Settlement of administration on decedent's estate; when probate court without jurisdiction.*—Jane R. died leaving her brother, Richard R., one of her heirs at law and distributees. Afterwards he died, and his estate was declared insolvent. At the time of his death, he was a large debtor to the estate of Jane R., and the claim was regularly proved and filed against his insolvent estate. C. is, and for many years has been the administrator of both estates. The settlement of the administration of Jane R.'s estate has been removed into, and is pending in the chancery court. C., as administrator of the insolvent estate of Richard R., having been cited to make a final settlement of his said administration in the probate court, pleaded the facts stated above, as ousting the jurisdiction of that court to make the settlement. *Held*, that neither estate could be completely settled, without taking into the account the settlement of the other, thus requiring the largely flexible powers of a court of equity; and that the powers of the probate court being inadequate to administer just and final relief in the premises, that court was without jurisdiction to make the settlement.



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APPEAL from Greene Probate Court.

Tried before Hon. W. C. OLIVER.

The facts are sufficiently stated in the opinion.

T. C. CLARK and THOS. W. COLEMAN, for appellant.

THOS. SEAY and JAS. E. WEBB, *contra*.

STONE, J.—Jane Randolph and Richard Randolph were sister and brother. Jane died without lineal descendants, leaving her brother Richard, who survived her, one of her heirs at law and distributees. Richard then died, and his estate has been decreed insolvent. Richard, at his death, was a large debtor to the estate of Jane, and her claim was regularly proved and filed against the insolvent estate. Thomas C. Clark, the appellant, is, and for many years has been, the administrator of each of said estates. The settlement of the administration of Jane's estate has been removed, and is now pending in the chancery court of Greene county. Clark, as administrator of the insolvent estate of Richard, was cited to make a final settlement of his said administration in the probate court, and he pleaded the facts stated above, as ousting the jurisdiction of the probate court to make the settlement. Demurrers were sustained to his pleas, and final decrees rendered against him, from which the present appeal is prosecuted. The sole question is, had the probate court jurisdiction to make the settlement.

For appellant, it is contended that inasmuch as Clark was the representative of each of the estates, and the interests of the two estates are antagonistic, this of itself deprived the probate court of jurisdiction to preside in the settlement. The following authorities are relied on in support of this view: *Hayes v. Cockrell*, 41 Ala. 75; *Bruce v. Strickland*, 47 Ala. 192; *Griffin v. Pringle*, 56 Ala. 486; *Ex parte Lyon*, 60 Ala. 650; *Tankersly v. Pettis*, 61 Ala. 364. The appellee contends that the probate court had jurisdiction, by virtue of the act of March 17, 1875 (Code of 1876, §§ 2625–6). We deem it unnecessary in this case to consider what effect the statute relied on has on our former rulings, cited above.

The appellant further contends that under the peculiar facts of this case, and the relations these estates bear to each other, the probate court, by reason of its limited, statutory powers, can not administer proper relief, and that on this ground the chancery court is alone competent to settle these complicated accounts.

Richard Randolph's estate is debtor to, and distributee in the estate of Jane Randolph. In order to distribute her estate, it is necessary, first, to reduce the assets to possession. The debt

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from Richard's estate is part of the assets, and, therefore, the *pro rata* of the assets of Richard's estate must be brought in. This, of course, only brings in the *pro rata* share now in hand, and does not include his distributive interest in Jane's estate. That has not been ascertained, and can not be until her estate is settled, and her estate can not be settled until the *pro rata* of the debt from Richard's estate is realized. Considering, now, that the administration of Jane's estate is pending in chancery, and that of Richard's, in the probate court, let us inquire how it will work, beginning, as we must, with a settlement of Richard's estate. Taking the result of the settlement shown in this record as a guide, Richard's estate paid a dividend a little less than twenty per cent. Proceeding next to settle and distribute Jane's estate, Richard's comes in for a distributive share, as one of the next of kin entitled to distribution. And this distributive interest in Jane's estate becomes assets in the hands of Richard's administrator, for a second settlement, distribution and disbursement among his creditors. Jane's estate, being one of his creditors, and the largest, receives another dividend on the debt of Richard's estate, which necessitates a second settlement and distribution of her estate among her next of kin, Richard's estate being one of her distributees. And this forces a third settlement of Richard's estate, and a third distribution among his creditors. Nor would the see-saw process end here, but we have not made the calculation to ascertain how often these cross settlements would have to be repeated, before the fund would be reduced so low, as to be unworthy of contention.

Against this cross contention, almost interminable in its nature, if the settlement of the Richard Randolph estate be transferred to the chancery court, where the settlement of the Jane Randolph estate is pending, then most if not all of these embarrassing difficulties will be obviated. The two accounts being taken together and before the same officer, one report and one decree can mete out equal and exact justice. And this, we hold, furnishes a sufficient equity for transferring the settlement of the Richard Randolph estate to the chancery court. *Stewart v. Stewart*, 31 Ala. 207; *Clark v. Eubank*, 65 Ala. 245; *Wharton v. Moragne*, 62 Ala. 201. The above is a summary of the obstacles in the way of probate jurisdiction, if Richard Randolph's indebtedness to his sister's estate existed before, and at the time of her death.

But suppose, as the record indicates, the indebtedness of Richard accrued after the death of his sister, testatrix, and grew out of his *devastavit* of assets of her estate, in his hands as her personal representative. Would this simplify the accounts? Not in the least. First, having received and failed

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to account for assets of her estate, could he claim distribution, until he had accounted for the assets he had thus received and converted, possibly in greater amount than his distributive share? Suppose his distributive share should be greater than the sum of his deficit to his sister's estate. This would produce additional assets of his estate, for disbursement among his creditors, excluding, of course, his sister's estate, which would, thereby, have ceased to be a creditor. Suppose, on the other hand, his distributive share should be less than the amount of his default. Then the excess only of his indebtedness would stand a charge against his insolvent estate, entitled, at its then reduced sum, to share in the distribution of his assets. Now, none of these inquiries could be answered—none of these perplexing difficulties solved—without a settlement, not only of Richard Randolph's estate, but of Jane's also. In fact, neither estate could be completely settled, without taking into the account the settlement of the other. Only one tribunal, with largely flexible powers, and by considering the accounts somewhat together, can administer just and final relief in the premises. The powers of the probate court are inadequate to the service. The settlement can be made properly only in the chancery court.

The decree of the probate court is reversed, at the cost of the appellees in the probate court and in this court. The cause will not be remanded.

## Herring v. Cherry, Smith & Co.

### *Motion to enter Judgment Nunc pro Tunc.*

1. *Amendment of record nunc pro tunc; evidence in support of.*—On a motion to amend a record *nunc pro tunc*, parol evidence is never admissible; but the court, in considering such motion, can only look to matters of record, or *quasi* of record, including any entry or order made by or under the authority of the court, in some book belonging to the office, and authorized to be kept by law, or to papers on file in the cause, which may properly be considered as *quasi* records of the court.

2. *Same; when entry of judgment can not be made.*—An amendment of the record *nunc pro tunc*, by entry of a judgment for the plaintiff, can not be made on a paper found in the file, not entitled in the cause, and not marked filed, purporting to be a verdict of the jury "for the plaintiff," and to be signed by the foreman, in the absence of some entry or memorandum on the judge's docket, or other record evidence, that a judgment was rendered in the cause at the term the trial is alleged to have taken place.

3. *Same; admissibility of parol evidence.*—In such case, it is not per-



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missible to prove by parol evidence, that there was a trial of the cause before a jury, and that the paper purporting to be a verdict was in fact the verdict returned by the jury.

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was a motion by the plaintiffs in a statutory real action in the nature of ejectment, appellees in this court, to amend the record *nunc pro tunc* by entering judgment in their favor. As recited in the bill of exceptions, on the hearing of the motion it was shown that "there was on file in the said cause a paper-writing as follows: 'We, the jury, find verdict for the plaintiff. C. W. Peabody, Foreman.' Said writing was not indorsed on the complaint, or any paper in the cause, but was written on a separate piece of paper, on which there was no other writing." The plaintiffs were then allowed to prove, against the defendant's objection, that at a previous term of the court, said cause was submitted to a jury, and was by them tried, and that "the paper-writing above referred to was returned by the jury as their verdict in said cause." To this ruling the defendant excepted. As further recited in the bill of exceptions, "this was all the evidence adduced to show there had been a trial of said cause, or a verdict rendered therein by the jury. There was no minute entry of any kind, nor was there any memorandum on the judge's docket, or elsewhere, showing that any trial of said cause had been had, or any verdict rendered, except the said paper-writing." The court granted the motion, and caused the said verdict to be entered of record, and a judgment to be entered thereon; and to this ruling the defendant excepted.

The rulings above noted are here, *inter alia*, assigned as error.

J. M. CHILTON, for appellant.

W. H. BARNES & SON, *contra*.

SOMERVILLE, J.—The amendment authorized by the circuit court in this case was improperly allowed under the rule prevailing in this State in reference to making amendments of records *nunc pro tunc*. Our established practice is to permit such amendments to be made only on matters of record, or *quasi* of record, and parol evidence is never admissible in aid of such a motion.—*Lilly v. Larkin*, 66 Ala. 126; *Nabers v. Meredith*, 67 Ala. 333; *Metcalf v. Metcalf*, 19 Ala. 319; *Draughan v. Tombeckbee Bank*, 1 Stew. 66; s. c. 18 Amer. Dec. 38; *Ex parte Jones*, 61 Ala. 399.

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The entry of a judgment *nunc pro tunc* is never proper, in the absence of record evidence that a judgment has been ordered by the court, its function being to supplement the failure or neglect of the clerk to copy such judgment more elaborately upon the record. For this purpose the court can only look to matters of record, including any entry or order made by or under the authority of the court, in some book belonging to the office, and authorized to be kept by law, or to papers on file in the cause, which may properly be considered as *quasi* records of the court.—*Hudson v. Hudson*, 20 Ala. 364. The amendment must be in aid of something that has been imperfectly done, and not to do something which has been totally left undone. If the record fails to show any entry or memorandum of the judge ordering a judgment, no case is presented authorizing a *nunc pro tunc* entry.—Freeman on Judg. (3d Ed.) §§ 68, 62.

Where the papers on file in the cause show a verdict rendered at a previous term, and there is an order or memorandum on the judge's docket showing the fact of the rendition of judgment on such verdict, however brief or imperfect, an entry *nunc pro tunc* may be made at a subsequent term of the court, entering up judgment in proper form. The case of *Mays v. Hassell*, 4 Stew. & Por. 222, cited on the brief of appellee's counsel, does not go further than this, and such, in fact, is the generally recognized rule on the subject.—*Thompson v. Miller*. 2 Stew. 470; *Gray v. Thomas*, 12 Sm. & Marsh. 111; *Shephard v. Brenton*, 20 Iowa, 41.

The record in the case before us fails to show any entry or memorandum on the judge's docket, or any other record evidence that a judgment was rendered in the cause at the term when the alleged trial took place. No action of the court is shown on the paper claimed to be a memorandum of the verdict of the jury signed by the foreman. This is fatal to the case, and could not be supplemented by oral evidence. We need say nothing of other errors assigned.

The act of March 1, 1881, regulating the mode of procedure in making amendments of this character, does not change the foregoing principles of law, which have so long prevailed in this State. It only provides for giving notice of such applications to adverse parties, and regulates the taxation of costs. The proviso is express, that the act "shall not be so construed as to extend or enlarge the power or jurisdiction of any court to enter any judgment, order, or decree, *nunc pro tunc*."—Acts 1880-81, pp. 66-67, § 3.

The judgment of the circuit court must be reversed, and a judgment here rendered dismissing the motion of the appellees at their own costs.

[Snyder v. Glover.]

**Snyder v. Glover.***Statutory Real Action in the Nature of Ejectment.*

1. *Conveyance by married woman of lands, her statutory estate ; when passes legal title.*—A deed of bargain and sale, absolute on its face, executed by husband and wife as required by the statute, reciting a moneyed consideration, and purporting to convey lands, the statutory separate estate of the wife, in the absence of fraud in the execution of the deed, passes the legal title, and will defeat an action of ejectment by the wife against the vendee, although a portion of the purchase-money may have been paid in the debt of the husband.

2. *Same ; when part of consideration the debt of the husband, wife's remedy.*—For that part of the consideration of the deed, in such case, which was paid in the debt of the husband, a suit at law could probably be maintained, and a bill in equity would also probably lie.

**APPEAL from Marengo Circuit Court.**

Tried before Hon. WM. E. CLARKE.

This was a statutory real action in the nature of ejectment, by Mrs. Mary T. Glover, a married woman, the wife of Pearson J. Glover, against John H. Snyder ; and was commenced on 3rd October, 1882. The trial resulted in a verdict and judgment for the plaintiff, from which the defendant prosecuted this appeal. The defendant claimed under a deed executed by the plaintiff and her husband, which is sufficiently described in the opinion ; while the plaintiff contended that the deed, purporting, as it does, to convey lands belonging to her statutory separate estate, was executed in consideration of a debt due the defendant by the plaintiff's husband, and was, therefore, void. There was evidence on behalf of the plaintiff tending to show that "the whole consideration of the deed was for her husband's debts, contracted by him with the defendant ;" but that a part of such debts was contracted for articles of comfort and support of the household, for which her statutory separate estate would be liable under section 2711 of the Code of 1876. The evidence introduced on behalf of the defendant tended to show that a part of the consideration of the deed was the payment of the husband's debts to the defendant, a large portion of which debts was contracted for articles of comfort and support, etc. ; and that the balance was a moneyed consideration.

Numerous exceptions were reserved by the defendant to charges given and refused ; and those rulings are here assigned as error. The opinion does not render it necessary to set out the charges.



[Snyder v. Glover.]

J. W. BUSH, for appellant.

R. H. CLARKE, *contra*.

STONE, J.—Each claimant in this contention rests the right of recovery on the postulate, that the lands sued for were of the statutory separate estate of Mrs. Glover. Snyder, the appellant, claims under and through her. The defendant's title is a deed of bargain and sale, absolute on its face, executed to him by Glover and wife in December, 1880, on a recited consideration of thirty-two hundred dollars paid. This deed was duly executed, and attested by two witnesses, with certificate of acknowledgment and registration in due form of law. There was no attempt to prove any fraud in the execution of the deed. This vested a legal title in Snyder, and is a complete answer to the action of ejectment, which can neither enforce nor consider equitable claims.—Code of 1876, § 2707.

If any portion of the purchase-money was paid in the debt of the husband, the remedy is not ejectment for the land. A suit at law for the unpaid purchase-money could probably be maintained, and a bill in equity to enforce the lien would also probably lie.—*Williams v. Bass*, 57 Ala. 487; *Shulman v. Fitzpatrick*, 62 Ala. 571; *Boyleston v. Farrior*, 64 Ala. 564; *Sinms v. Kelly*, 70 Ala. 429; *Morris v. Harvey*, 4 Ala. 300; *Williams v. Higgins*, 69 Ala. 517. *Prince v. Prince*, 67 Ala. 565, was a suit in equity, and the conveyance only a deed of trust, which the wife had no power to make. That case is not opposed to the views expressed above.—*Garrett v. Lehman*, 61 Ala. 391.

We need scarcely add that so far as the present transaction was based on money actually paid, if such was the case, the plaintiff has no just ground of complaint. And Snyder having the legal title, by what, on its face, purports to be a valid sale and conveyance, we need not, and do not, decide whether or not he may retain it as payment *pro tanto*, or security, to the extent he may show a valid claim, otherwise unsatisfied, for such supplies as fall within section 2711 of the Code of 1876. That question we leave open.—*Castleman v. Jeffries*, 60 Ala. 380.

Many of the rulings of the circuit court are opposed to these views. We need not specify them.

Reversed and remanded.

[Murphy v. Butler, Pitkin &amp; Co.]

**Murphy v. Butler, Pitkin & Co.***Trial of Right of Property.*

1. *Declarations of vendor; when not admissible against vendee.*—The declarations or admissions of a vendor, made prior to the sale, and not connected with it, in the absence, and without the knowledge of the vendee, are not admissible against the latter for the purpose of destroying his title, or of involving him in fraud.

2. *Trial of right of property levied on under attachment; damages for delay not authorized.*—The statute authorizing the jury to award damages against the claimant in a trial of right of property, if it be shown that the claim was interposed for delay (Code, § 3343), by its terms applies only when there is a levy of *execution* upon the property; it is incapable of application, when the levy is of an *attachment*.

APPEAL from Chambers Circuit Court.

Tried before Hon. JAMES E. COBB.

Butler, Pitkin & Co., on 8th January, 1883, sued out an attachment against J. H. Murphy & Co., which was levied on designated articles of merchandise. This property was claimed by W. N. Murphy, and, on his making the statutory affidavit and bond, it was delivered to him by the sheriff. The cause was tried on an issue made up under the statute, the trial resulting in a verdict and judgment in favor of the plaintiffs in attachment. On the trial evidence was introduced tending to show that the claimant purchased the goods attached from the defendants several days before the attachment was issued. The sale to the claimant, the plaintiffs contended, was fraudulent. The plaintiffs offered in evidence a written statement made by the defendants in attachment in August, 1882, to Hurst, Purnell & Co., merchants at Baltimore, to whom they had applied for credit, touching their financial condition, and containing declarations as to the amount of their assets and liabilities. To the admission of this statement the claimant objected, his objection was overruled, and the statement allowed to go to the jury; and to this ruling he excepted. The court charged the jury, *inter alia*, that "if they found from the evidence, that the claim was put in for delay merely, they might, in their discretion, assess damages for delay at ten per cent.;" and to this charge the claimant excepted. It appears from the judgment entry, that the jury assessed damages for delay at the rate mentioned in the charge.

The rulings above noted are here assigned as error.

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W. J. SAMFORD, for appellant.

J. R. DOWDELL, and WATTS & SON, *contra*.

BRICKELL, C. J.—The statement or declaration as to their pecuniary condition made by the defendants in attachment to Hurst, Purnell & Co., several months prior to the sale under which the claimant deduced title to the goods in controversy, was not (so far as now appears) introduced for the purpose of contradicting or impeaching evidence given by either of the defendants, and it was certainly, in point of time, and in every other respect, disconnected with the main fact which was the matter for the consideration of the jury. If the statement was untrue, the fact of its falsity, however deliberately it may have been made, and with whatever impurity of purpose, did not warrant a presumption, that a sale made by the defendants to the claimant, several months subsequently, was infected with like falsity, and like impurity of intent. A crime is not proved by evidence of other like criminal offenses, and evidence of one fraud, separable and distinct, is not admissible to prove that a party is guilty of a particular fraud with which he is charged. *Johnston v. Br. Bank Montgomery*, 7 Ala. 429. The declarations or admissions of a vendor, made prior to the sale, and not connected with it, in the absence, and without the knowledge of the vendee, can not be received to affect the vendee, to destroy his title, or to involve him in fraud.—*Jones v. Norris*, 2 Ala. 526; *Garner v. Bridges*, 38 Ala. 276. The evidence was irrelevant, and ought not to have been received.

When personal property is levied on by execution, and a trial of the right is claimed, if it be shown that the claim was interposed for delay, the statute (Code of 1876, § 3343) authorizes the jury to award damages against the claimant, “not less than ten *per centum* on the execution.” The statute by its terms applies only when there is a levy of execution upon property, and is incapable of application to a trial of the right, had when the levy is of an attachment. The execution issues upon a judgment, and for a fixed, certain, definite sum or amount, conclusively ascertained by the judgment. The attachment issues for the sum or amount claimed by the plaintiff, which the judgment rendered may vary, as is warranted by the evidence upon trial of the distinct, independent, suit, in which the attachment is the original or auxiliary process. The sum claimed affords no fixed, definite basis, upon which there can be an assessment of damages, like that afforded by the judgment upon which the execution issues. The instruction given the jury upon this point was erroneous.

Reversed and remanded.



[Knight v. Ray.]

**Knight v. Ray.***Bill in Equity to charge Land with the Reimbursement of Money used in its Purchase.*

1. *Transfer of one of several notes secured by mortgage; priority of lien.* The transfer of one of several notes secured by mortgage clothes the transferee with the right to be first paid out of the mortgaged property.

2. *When land charged with reimbursement of money used in its purchase.*—K., holding three promissory notes made by S., payable to himself, and secured by a mortgage on lands, traded and transferred one of the notes to R. for a valuable consideration. S. having made partial payments to K., but leaving unpaid to him a considerable balance, K. sold the lands under a power contained in the mortgage, and at the sale A. was set down as the purchaser at a price greater than the amount due to R., but less than the amount due to K. No money was paid on this purchase, but K. conveyed title to A., who immediately reconveyed to K., no money passing, K. merely entering a credit on the mortgage of the amount bid at the sale. *Held,*

(a) That this was, in effect, an investment by K. of the funds realized from the sale, in the lands.

(b) That when K. made the sale, the proceeds being primarily due to R., it was his duty to pay the latter's demand before applying any of the proceeds to his own claim.

(c) That by investing the money in lands, instead of paying it to R., K. armed R. with the right to have a lien declared on the lands purchased for the payment of the money thus improperly invested.

APPEAL from Chilton Chancery Court.

Heard before Hon. N. S. GRAHAM.

The facts are sufficiently stated in the opinion.

L. E. PARSONS, JR., J. S. EDWARDS and WATTS & Son, for appellant.

WM. A. COLLIER, *contra*.

STONE, J.—The lands in controversy in this cause were first sold by Ray and wife to Miss Knight, and afterwards sold by her to her brother, the appellant. We need not consider any rights which may be supposed to arise out of these transactions. Nor need we consider the question of vendor's lien, as between Knight and the Sandfords, his vendees. These questions are immaterial, in the view we take of this case.

Knight, the appellant, held three notes, made by the Sandfords, payable to himself, and secured by a mortgage on the lands in controversy, with power of sale on default. One of

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these notes he traded and transferred to Mrs. Ray for a valuable consideration, and retained the ownership of the other two notes. The Sandfords made partial payment to Knight, but left unpaid to him a balance of four hundred, or more dollars. Thereupon Knight, after due advertisement, sold the lands under the power in the mortgage, and another Knight was set down as the purchaser, at the price of three hundred and fifty dollars; a sum in excess of the amount due Mrs. Ray, but much less than the whole sum due on the mortgage. No money was paid on this purchase, but Knight, the mortgagee, conveyed title to Knight, the purchaser, who immediately reconveyed to his vendor, the appellant. No money was passed, but the mortgagee entered a credit on the mortgage, of the sum realized from the sale. This, then, was in effect, an investment by Knight, the mortgagee, of the funds realized from the sale, in the lands sought to be subjected by this bill; and Mrs. Ray is seeking to trace her money into this land, and to charge it with its reimbursement.

While all the notes remained the property of Knight, the mortgaged lands were equally bound for the payment of each. When, however, Knight traded and transferred one of the notes to Mrs. Ray, retaining the others, although the transfer was by mere delivery, he clothed her with the right to be first paid out of the property mortgaged.—*Doe ex dem. v. McCloskey*, 1 Ala. 708; *Cullum v. Erwin*, 4 Ala. 452; *Wallace v. Nichols*, 56 Ala. 321. When Knight made the sale, the proceeds of right being primarily due to Mrs. Ray, it was his duty to pay, first, her demand, before applying any of the proceeds to his claim. Failing to do so, an action for money had and received lay in her favor; and when, instead of paying the money to her, he invested it in lands, he armed her with the right to have a lien declared on the land thus purchased, for the payment to her of her money, thus improperly invested. *Preston v. McMillan*, 58 Ala. 84.

The Sandfords were unnecessary parties, and we need not inquire whether the case was properly at issue as to them.

Affirmed.

[Hawes v. Brown.]

**Hawes v. Brown.**

*Bill in Equity to enjoin Sale of Land under Mortgage, and to set off Judgment against Mortgage Debt.*

1. *When complainant must fail for want of proof.*—When an affirmative fact is pleaded in a bill in equity as the basis of the relief prayed, and the fact is denied by the defendant in his answer, the burden of proof being on the complainant, if the evidence touching the fact is equally balanced, or if the evidence does not produce a just, rational belief of its existence, if it leaves the mind in a state of doubt and uncertainty, the party affirming the fact fails for want of proof.

APPEAL from Coosa Chancery Court.

Heard before Hon. N. S. GRAHAM.

In this case William L. Hawes seeks, by bill in equity against L. J. Brown, to enjoin a sale of land under a power contained in a mortgage executed by the complainant to the defendant, and to set off against the mortgage debt a judgment obtained against the defendant by one Wagner, and an account due by defendant to one Gamble, both of which are averred to have been transferred to the complainant. The issue between the parties, as to the Gamble account, was whether it had been paid. The bill, as amended, avers, in substance, that, in 1872, the complainant, being indebted to the defendant, executed to him his three promissory notes, one of which was for about the sum of \$75; that about the time this note became due, the defendant owed Gamble the account in controversy, which exceeded the amount of the note, and, in settlement thereof, turned over said note to Gamble, guaranteeing its payment; that afterwards suit was instituted on the note against complainant, and a judgment was obtained thereon in favor of defendant for the use of Gamble; that afterwards the defendant obtained judgments against complainant on the other two notes which he had executed to the defendant; and that afterwards these judgments, including the one in favor of defendant for the use of Gamble, were compromised with defendant, and the amount agreed on in compromise was the consideration of the debt secured by the mortgage. The defendant answered, and in his answer averred, in substance, that he had paid the Gamble account by transferring, without recourse, the said note for \$75; and denied that he ever had any control over the Gamble judgment against complainant, that it entered into the



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compromise referred to in the bill, or that it formed a part of the consideration of the mortgage debt.

The chancellor allowed the Wagner judgment, with interest, as a set-off, but refused to allow the Gamble account, and from the decree rendered the complainant prosecuted this appeal, here assigning it as error.

L. E. PARSONS, JR., for appellants.

W. D. BULGER, *contra*.

BRICKELL, C. J.—The fact the plaintiff was bound to prove, in order to obtain further relief than that which was granted to him, was, that the Gamble judgment formed part of the consideration of the mortgage debt. The fact, if it exists, must be within the knowledge of the parties, and, so far as appears, in reference to it there ought not to be cause or room for dispute. Their evidence is, however, in that painful and irreconcilable conflict which too often characterizes the testimony of litigating parties, embarrassing rather than aiding the administration of justice. As we have said, the burden of proving the fact rests upon the plaintiff; it is an affirmative fact pleaded by him as the basis of the relief prayed. The fact being denied and put in issue, if the evidence of it is equally balanced, or if the evidence does not produce a just, rational belief of the existence of the fact, if it leaves the mind in a state of doubt and uncertainty, the party affirming the fact fails for want of proof.—*Lehman v. McQueen*, 65 Ala. 570. We have carefully examined the testimony, and we fail to discover that the chancellor erred in the conclusion that the fact was not satisfactorily proved; and the decree must be affirmed.

## Kiser & Co. v. Gamble.

*Bill in Equity by Creditor to have Conveyance of Land set aside as Fraudulent.*

1. *Fraudulent conveyance; when fraudulent intent must be participated in by grantor.*—To render fraudulent and void, as against the grantor's creditors, a deed to lands executed by a husband to his wife in consideration of a large debt which he owed her, and which constituted a part of her statutory separate estate, it is not sufficient that the husband's intent, in executing the deed, was to hinder, delay or defraud his creditors; but it must also clearly appear that the wife participated in such fraudulent intent.

[Mohr v. Chaffe Bros. & Co.]

APPEAL from Tallapoosa Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed by Kiser & Co., creditors of George W. Gamble, against said Gamble and his wife, for the purpose of vacating and setting aside a deed to lands, executed by him to her. On the hearing, had on pleadings and proof, the chancellor was of the opinion that the complainants were not entitled to relief; and he caused a decree to be entered, dismissing their bill. That decree is here assigned as error.

J. M. CHILTON, for appellants.

W. H. BARNES and OLIVER & GARRETT, *contra*.

SOMERVILLE, J.—If we concede that the evidence satisfactorily shows that the respondent, George W. Gamble, made the conveyance, which is assailed in the bill as fraudulent, with the intent to hinder, delay or defraud his creditors, it is not clear to us that the grantee, Mrs. Gamble, participated in such fraudulent intent. This was requisite in order to vitiate the *bona fides* of the conveyance, which was unquestionably based upon the valuable consideration of a large debt due by the grantor to the grantee, belonging to her statutory separate estate.—*Warren & Burch v. Jones*, 68 Ala. 449; *Marshall v. Croom*, 60 Ala. 121; *Coleman v. Smith*, 55 Ala. 369; *Flewel-ten v. Crane*, 58 Ala. 627.

Affirmed.

## Mohr v. Chaffe Bros. & Co.

### *Attachment.*

1. *Motions to dismiss and strike from docket in attachment suit; when not revisable on appeal.*—Motions made in the City Court of Montgomery, in an attachment suit on the docket of that court, to strike the cause from the docket and to dismiss, on the ground that it appears from the bond and writ, that the attachment is returnable to, and the cause triable in the Circuit Court of Montgomery county, are but the equivalent of a motion to quash the attachment because of defects or irregularities in the affidavit, bond and writ; and, being addressed to the sound discretion of the primary court, the action of the court in overruling them can not be reviewed on appeal.

2. *Bond and writ in attachment; amendment of.*—A ruling of the primary court, in such case, allowing the writ to be amended, and a new bond to be executed, so as to make it appear that the attachment was returnable to the city court, is, under the statute, free from error.

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3. *Plea in abatement ; must give plaintiff a better writ.*—While, under the statute, a plea, whether in bar or in abatement, is sufficient, if the facts are so stated that a material issue can be taken thereon, the rule still prevails that a plea in abatement must give the plaintiff a better writ, this being, in such plea, essentially matter of substance.

4. *Attachment ; when plea in abatement defective.*—A plea in abatement in an attachment suit, which craves oyer of the affidavit, bond and writ, and sets them out, but fails to specify or point out any defect or irregularity in either, is fatally defective on demurrer.

APPEAL from City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

This was an action brought by R. H. Chaffe Bros. & Co. against Alex. Mohr, and was commenced by an original attachment, which was sued out of, and was issued by the clerk of the City Court of Montgomery, on the 11th December, 1883. From the recitals in the bond and the mandate of the writ, it is made to appear that the attachment was returnable to the Circuit Court of Montgomery county. The defendant filed a plea in abatement, craving oyer of the affidavit, bond and writ, which are set out, but failing to point out or specify any defects in either. The plaintiffs demurred to the plea, on the ground that it "in no place or manner points out wherein said writ of attachment, affidavit and bond in said cause are defective." The court sustained the demurrer. The defendant also separately moved to strike the cause from the docket, and to dismiss it, on the grounds, in substance, that it appeared from the bond and writ that the attachment was made returnable to, and the cause was triable in the Circuit Court of Montgomery county ; and that, therefore, it was improperly on the docket of the city court. The court overruled both of these motions ; and to these rulings, as is recited in the judgment-entry, the defendant duly excepted. The plaintiffs then moved for leave "to amend the writ of attachment so as to make said writ, upon its face, returnable to the city court, and to be allowed to make a new bond in said cause." This motion was granted, and the amendment made, and the new bond executed as authorized by the court ; and to this ruling, as recited in the judgment-entry, the defendant excepted. No bill of exceptions appears to have been taken in the cause ; but it is recited in the judgment-entry that "it was ordered by the court that each of said motions, as the same appears on the motion docket, with the orders of the court thereon, be made part of the record in this cause, and embraced in any transcript thereof made by the clerk for appeal to the Supreme Court accordingly." The judgment-entry further recites : "And the plaintiffs, in open court, consent that an appeal may be taken by the defendant to the present term of the Supreme Court of Alabama, for the



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purpose of revising the ruling of the court upon each of said motions and the said demurrers."

The rulings above noted are here assigned as error.

W. L. BRAGG and R. M. WILLIAMSON, for appellants.

H. STRINGFELLOW, JR., and DAVID CLOPTON, *contra*.

BRICKELL, C. J.—1. The assignments of error relating to the action of the city court in overruling the motions to dismiss and to strike from the files, do not present matter which on error is revisable. They were but the equivalent of a motion to quash the attachment, because of defects or irregularities in the affidavit, bond and writ; and it has long been settled that such a motion is addressed to the sound discretion of the primary court, and may, without error, be overruled, putting the party to a plea in abatement, which is the more appropriate mode of taking advantage of the defect or irregularity, if it exists.—1 Brick. Dig. 164, §§ 151-54; *Free v. Howard*, 44 Ala. 195; *Hall v. Brazelton*, 46 Ala. 359; *De-Bardeleben v. Crosby*, 53 Ala. 363; *Watson v. Auerbach*, 57 Ala. 353; *Murphy v. Egger*, 59 Ala. 639. The statute is framed with reference to this practice.—Code of 1876, § 3314.

2. Pleas in abatement were not favored at common law. Matters of form were regarded as matters of substance; and an improper conclusion or prayer, or any defect of form, was as fatal as a defect of substance in a plea in bar. The statute has now placed pleas in bar and pleas in abatement on the same footing in respect to form. Whether a plea is in bar, or in abatement, is ascertained by the subject-matter and prayer, not by its form; and whether in bar, or in abatement, the plea is sufficient, if the facts are so stated that a material issue can be taken thereon.—Code of 1876, §§ 2987, 2990; *Hall v. Brazelton*, 46 Ala. 359. "The criterion or leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake, in another suit in regard to the same cause of action; or, in technical language, *must give the plaintiff a better writ*."—1 Chit. Pl. (16th Am. Ed.) 362. If it be of misnomer, the true name must be stated, that it may be correctly stated in another suit. If it be of the non-joinder of parties, the parties omitted must be stated. If it be of defects in the process, these defects must be distinctly pointed out, so that on suing out new process they may be avoided. This is essentially matter of substance in a plea in abatement—the material facts on which the plea is founded.—*Jones v.*

[Meyer v. Hearst.]

*Nelson*, 51 Ala. 471; *Wilson v. Nevers*, 20 Pick. 20. The plea interposed in abatement craves oyer of the affidavit, the bond, and the writ, and sets them out; but it does not specify or point out any defect or irregularity in either, and, of consequence, does not furnish the plaintiff the means of avoiding them in a new suit, or of curing them by amendment, if under the statute of amendments they are curable. It is violative of the policy of the law in reference to dilatory pleas, and in derogation of the whole theory and doctrine of amendments, to entertain a plea so vague and indefinite. The demurrer to it was properly sustained.

3. The allowance of the amendments was authorized by the statute.—*Blair v. Miller*, 42 Ala. 308; Code of 1876, § 3315. The execution of a sufficient bond, conforming to the amendments, is expressly authorized by the statute.

Let the judgment be affirmed.

## Meyer v. Hearst.

### *Trover.*

1. *Judgment rendered and execution issued after defendant's death; validity of.*—A judgment rendered against a party after his death is a nullity; and an execution issued on a valid judgment, after the defendant's death, is void, unless the judgment supporting it has been revived, or it is issued in order to continue a lien already acquired by previous execution.

2. *Sale under void process also void.*—A sale of property under void process is also void, and confers no title on the purchaser.

3. *Execution of process regular on its face, though void in fact; § 3041 of Code construed.*—The statute providing that a sheriff or other ministerial officer is justified in the execution of process regular on its face, whatever may be the defect in the proceeding on which it was issued (Code, 1876, § 3041), is intended only for the protection of the officer executing the process, and can not impart validity to a levy and sale made by him under the process; nor can the protection of the statute be extended to third parties who procured the issue and execution of the process.

4. *Trover; when possession will support.*—When personal property, in the possession of the widow, is levied on and sold under an execution issued on a void judgment against her deceased husband, she may maintain trover on her possession, unaided by title, for a conversion of the property.

5. *When testimony not hearsay.*—When an exchange of personal property is made by an agent for his principal, the report of the transaction by the agent to the principal for ratification is part of the *res gestæ*, in a suit involving the title to the property received by the agent in the exchange.

[Meyer v. Hearst.]

APPEAL from Dallas Circuit Court.

Tried before Hon. JOHN MOORE.

This was an action of trover, brought by Rebecca Hearst against Marcus Meyer, W. J. Rountree and others, to recover damages for the alleged conversion of certain seed-cotton, cattle, a mule and other personal property; and was commenced on 5th July, 1883. The defendants' pleas are not disclosed by the record. There was a judgment in the court below in favor of the plaintiff.

The plaintiff was examined as a witness in her own behalf, and she testified, *inter alia*, that in 1866 she, by her own labor, earned about \$18.00, with which she purchased a cow, and that of this cow all the cattle mentioned in the complaint were the increase or off-spring; that, in 1868, she earned \$60, by cooking for a named party, which she received as her own property, with the knowledge and consent of her husband; that with this money she purchased a mule, which was exchanged for a horse, and, a few years after this, the horse was exchanged by her for the mule mentioned in the complaint; that her husband never claimed any of said property, but it was all the time managed and controlled by her as her own property; that she lived with her husband from 1865 until May, 1882, when he died; and that the cotton sued for was made by her labor, and that of her infant son and of her said husband, prior to his death, and of hands whom she hired, on lands rented by her, and with supplies furnished by her. On cross-examination said witness testified that she was not present when the mule which she had purchased was exchanged for the horse, and that she "only knew of it from what others had told her;" but that the exchange was made "by her permission, and with her consent." The defendants thereupon moved the court to exclude from the jury the testimony of the witness as to the exchange of the mule for the horse, on the ground that it was hearsay. The court overruled the motion, and the defendants excepted. The other facts disclosed by the evidence are sufficiently stated in the opinion. The bill of exceptions purports to set out all the evidence introduced on the trial.

The defendants asked the court in writing to charge the jury, that if they believed the evidence, they must find for the defendants as to the cotton mentioned in the complaint. This charge the court refused, and the defendants excepted.

The rulings above noted are the only errors here assigned.

WHITE & WHITE, for appellants.

JNO. C. REID, *contra*.



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SOMERVILLE, J.—The action is one of trover, brought for the conversion of a lot of seed-cotton, and some other articles of personal property, which were at the time in plaintiff's possession under a claim of ownership. The alleged act of conversion is the taking of the property by one of the defendants, who was sheriff of Dallas county, under an execution issued on a judgment rendered against one Avery Hearst, the deceased husband of the plaintiff, in favor of three of the other defendants, who were plaintiffs in the judgment.

It is made to appear by the record that the judgment in favor of Meyer Bros. against Hearst was rendered after his death, viz., on the thirtieth of June, 1882, the defendant having died in May previous of the same year. The judgment was, therefore, *void*, under the principle settled by the decisions of this court, that a judgment rendered against a dead man is a mere nullity.—*Hood v. Branch Bank*, 9 Ala. 335; *Powell v. Washington*, 15 Ala. 803. See, also, Freeman on Judg. § 153, and cases cited in note 1. So, independently of this fact, the principle is settled that an execution which issues, even on a valid judgment, after the defendant's death, is void, unless there be a revival of the judgment, or such execution is issued in order to continue a lien already acquired by a previous execution.—*Collier v. Windham*, 27 Ala. 291; Code, 1876, §§ 2633, 3213.

When the execution is void, because issued against a deceased defendant, it necessarily follows, as often expressly decided, that a sale of property made under such process is void, and confers no title on the purchaser.—*Beach v. Dennis*, 47 Ala. 262; *Whitlock v. Whitlock*, 25 Ala. 543; Freeman's *Void Jud. Sales*, § 2.

The case then presented is that of a levy by the sheriff, at the instance and procurement of the other defendants, of an execution issued against a defendant after his death, on a judgment rendered also after his death. The process under which the sheriff acted was unquestionably void, and the general rule would be, that "all acts performed under it, and all claims flowing out of it, are void."—Freeman on Judg. § 117.

There is a statute, however, in this State, declaratory, it seems, only of the common law, which authorizes a sheriff or other ministerial officer to justify under process regular on its face. Section 3041 of the Code provides as follows: "Whenever it appears that the process is regular on its face and is issued by the competent authority, a sheriff or other ministerial officer is justified in the execution of the same, whatever may be the defect in the proceedings on which it was issued." Code, 1876, § 3041. The question is as to how far this sale would afford protection, if any, to the co-defendants of the

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sheriff, who pointed out the property levied on, and expressly authorized its seizure. The execution itself is not set out in the record, but we may assume that it was regular on its face in view of the reasonable presumption, that the officer who issued it did his duty by issuing the process in regular form. We can entertain no doubt of the proposition that this statute, like the similar rule of the common law, was intended only for the protection of the officer, and can not be construed to impart legal validity to his act of seizure and sale. If otherwise, there would be no difference between seizures under void and valid process. It is said in Crocker on Sheriffs: "The rule that an officer is justified by his process, not void upon its face, is one of protection only. And if it is in fact void, he can not build up a title under it which will enable him to maintain an action against third persons."—Crock. on Sher. § 286. In *Morrison v. Wright*, 7 Port. 67, while the general principle was stated to be, that a sheriff was bound to execute all process directed to him by a competent tribunal, and regular on its face, and could therefore justify under it, it was held to afford no protection to a third person who might participate in a wrongful levy made under illegal process, the law holding him to act at his own peril. As is said by Cowen J., in *Earl v. Camp*, 16 Wend. 562, 566, "the rule is one of protection merely, and beyond that not meant to confer any right. The armor which it furnishes is strictly defensive. It is personal to the officer himself; and can not be used to confer any right upon the wrongdoers under color of whose void proceedings he is called upon to act." See, also, Freeman on Ex. § 100; *Dunlap v. Hunting*, 2 Denio, 643; *Horton v. Hendershot*, 1 Hill (N. Y.), 118.

Under this view it is plain that, while the defendant Rountree could personally justify making a levy under the void process which went into his hands against the deceased husband, provided the property sued for was his, and not the plaintiff's, it afforded no protection to the other defendants.

It may be that the cotton might have been liable for the debt of the husband, upon the theory urged by appellant's counsel, that it was but the earnings or proceeds of the joint labor of the wife and her minor child, coupled with that of the husband prior to his death; but it could be subjected only under a valid execution or other process, not under a void one. The plaintiff was in possession of the cotton, and her possession, without regard to any question of ownership or title, was sufficient to maintain the action of trover against mere trespassers; for possession of personalty is sufficient evidence of ownership, in an action of trover, against mere trespassers who claim no title to it.—*Donnell v. Thompson*, 13 Ala. 440; *Williams v. Crum*,

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27 Ala. 468. "A mere wrongdoer," says Mr. Greenleaf, "is not permitted to question the title of a person in the actual possession and custody of the goods, whose possession he has wrongfully invaded. The naked possession of goods, with claim of right, is sufficient evidence of title against one who shows no better right."—2 Greenl. Ev. (14th Ed.) § 637; *Huddleston v. Huey*, 73 Ala. 215; *Patterson v. Kicker*, 72 Ala. 406.

The charge requested by the defendants was properly refused, if for no other reason, on the ground that it claimed the same degree of protection for all the other defendants as for the defendant Rountree, in the act of seizing the cotton under void process.

We are of opinion that the evidence admitted as to the alleged exchange of the mule for the horse, as testified to by the plaintiff, was free from objection. The fact of such exchange was proved, by a witness who was present, to have been made by an agent of the plaintiff, she herself not being present. This exchange she intended to ratify by receiving the property. It was perfectly competent for her to say that she was informed by others of the fact of the exchange, because such information was necessary in order to enable her to act intelligibly. The report of such a transaction by an agent to a principal is a part of the *res gestæ*, and admissible clearly upon this ground. It is not strictly hearsay evidence, within the proper meaning of that term as used in the books, and objection was interposed to its admission on no other ground.

The judgment is affirmed.

## Gardner & Gates v. Moore.

### *Bill in Equity for Reformation of Mortgage of Homestead.*

1. *Mortgage of homestead; jurisdiction of court of equity.*—A court of equity will assume jurisdiction to reform a mortgage of a homestead belonging to a married man, and executed and acknowledged by him and his wife in strict conformity with the statute, by correcting the description of the conveyed premises, where the premises are described in the mortgage as containing a stated number of acres, and including the family residence, stables and other improvements, and the desired reformation does not seek to increase the quantity of the lands conveyed, or to locate them in a different section, but merely to correct an admitted error in the designation of the subdivisions of the same section.

2. *Same; jurisdiction distinguished from other cases.*—This case distinguished from cases in which the specific performance of an agreement



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of a married woman to convey is sought, and from cases in which the power of the court is invoked in aid of the defective execution of a statutory power.

APPEAL from Jefferson Chancery Court.

Heard before Hon. THOMAS COBBS.

This was a bill in equity exhibited by Gardner & Gates against P. P. Moore and L. H. Moore, his wife, for the purpose of reforming a mortgage executed by the defendants on 2nd June, 1881, and purporting to convey a designated tract of land in Jefferson county, belonging to P. P. Moore, and on which he resided at the time of the execution of the mortgage, and also at the time of the filing of the bill. The description found in the mortgage is "the west half of the south-west quarter of the south-east quarter, and the south-west quarter of section 36, township 19, range 5, west, containing 180 acres, and including our present family residence, stables and other improvements and buildings on said lands." The description averred in the bill to be the true description of the lands intended to have been conveyed is, "all that portion of the south-east quarter of section 36, in township 19, of range 5, west, east of west fork of Five Mile creek, containing not less than 120, and not more than 180 acres, and including the family residence, stables and other improvements and buildings on said lands;" and a plat of the lands is also exhibited with the bill. The other facts necessary to an understanding of the points decided are sufficiently stated in the opinion.

It was agreed, *inter alia*, that "if it shall be decided in this case that the mortgage mentioned in the bill can not be reformed so as to embrace the homestead of the respondents, a decree shall be rendered requiring it to be ascertained whether all the lands intended to be conveyed in said mortgage, or a portion thereof, and if a portion, what portion constitutes the said homestead of respondents." On the hearing, had on pleadings, agreement of counsel and proof, the chancellor caused a decree to be entered, declaring that "the complainants are not entitled to have the mortgage described in the bill reformed so as to embrace the homestead of the respondents, but are entitled to the relief prayed only as to the lands which do not constitute the homestead of respondents;" and ordering a reference in accordance with the agreement of counsel copied above; and that decree is here made the basis of the assignments of error.

J. T. TERRY, for appellants. In this State the law is settled, that where the husband *executes* a mortgage on his homestead, *without his wife joining him as required by law*,

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the mortgage is void.—*Garner v. Bond*, 61 Ala. 84; *Miller v. Marks*, 55 Ala. 322; Code, 1876, §§ 2822, 2158, 2125. In this case, the wife *joined* her husband in the *execution* of the mortgage, as required by law to make the act of *execution* valid; while in the cases cited above, she failed to so join her husband; and, in consequence of such failure of the wife to *execute* her power as provided by law, the mortgage was held a nullity. The cases cited are directed against the validity of the *fact* of the *execution* of the mortgage; while here, the *fact* of *execution* is admitted.

SMITH & BRADFORD, *contra*. This case presents for consideration a single question—whether a court of equity has the power to reform a conveyance so as to include the homestead of the grantor. It has already been settled that an agreement to convey the homestead can not be enforced in equity.—*Jenkins v. Harrison*, 66 Ala. 361. The reformation of a conveyance is the “creation” of it. Until reformed, it rests in unexecuted intention.—*Blodgett v. Hobert*, 18 Vt. 414; *Provost v. Rebman*, 21 Iowa, 419; *Chapman v. Fields*, 70 Ala. 405. In the case at bar, the appellants have no conveyance which *passes the legal title to the homestead*. Such legal title is still in the appellee. To grant the relief prayed in the bill, requires a *divestiture of such title out of appellee*. That can be done only in one way—by the *voluntary signature and assent* of the *wife of the appellee* to a conveyance which is “*operative to pass the legal title*.”—*Jenkins v. Harrison, supra*. What the Constitution and laws require to be *voluntarily done*, can not be accomplished through the compulsory powers of a court of equity.

SOMERVILLE, J.—The question raised by the record for our decision is, whether a court of equity will assume to rectify a *misdescription* of certain lands conveyed by a married man and his wife, which was intended by them to embrace their *homestead*; the deed of mortgage which is sought to be reformed, having been executed with all the formalities required by statute. In this State no mortgage, or other alienation of a homestead exemption, is valid without the voluntary signature and assent of the wife of the owner, which must be shown by the examination of the wife, separate and apart from the husband, had before an officer authorized by law to take acknowledgments of deeds, and must be certified by such officer in due form.—Code, 1876, § 2822. It is settled law with us, that a conveyance of the homestead by the husband alone is void, in the absence of the wife’s voluntary signature and assent, manifested in substantial accordance with the provisions of the

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statute. In this case, however, as we have said, no objection is taken to the mode or form in which the instrument is executed, which is in strict conformity to statutory requirements. The only point of contention is, that a court of equity has no power to reform the instrument by correcting a misdescription of the land, because that which is actually conveyed is different in description from that intended to be conveyed, and, it is insisted, that equity will not interfere in such a case, to rectify on the ground of mistake, especially as against a *feme covert*.

The objection is one supported by strong reason and respectable authority, and we were much disposed, at first consideration, to concur in it, as the chancellor seems to have done. After maturer study, however, we have reached the opposite conclusion, which we deem to be the better and more just view.

The rule may be conceded to be generally settled, both in England and in this country, that a court of equity will not intervene to decree the specific performance of an agreement made by a married woman during her coverture. Under the rules of the common law, she could not, by uniting with her husband in a deed of conveyance, bar herself, or her heirs, of her right of dower, or other interest in the real estate of her husband. Such a deed was absolutely void, as were her contracts generally, except those relating to her equitable separate estate, and a few others made in a trust capacity. Her only mode of conveying real estate was by uniting with her husband in the solemn proceeding of record known as fine and recovery.—*Martin v. Dwelly*, 6 Wend. (N. Y.) 9.

In obedience to these principles it has been held by this court, that the statute prescribes the only mode in which a married woman is authorized to convey her statutory separate estate, and that none other could be substituted or recognized by the courts; and that equity would accordingly refuse to enforce as against her the specific performance of a defectively executed conveyance, although it might justly be regarded as an agreement by her to convey, but for the disability imposed by coverture.—*Blythe v. Dargin*, 68 Ala. 370. So, in a recent case, decided by this court, where an instrument was held defective and inoperative as a deed for want of delivery, but was deemed good only as a contract to convey by husband and wife, specific performance of it was refused after the death of the husband, against the objection of the surviving wife, as to the homestead of the parties.—*Jenkins v. Harrison*, 66 Ala. 345. See also *Butts v. Broughton*, 72 Ala. 294. The reason upon which the two cases are based is essentially the same—that a married woman has no authority, under the statutes of this State, to enter into an executory agreement to sell either her separate estate under the statute, or the homestead occupied by



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herself and her husband. No attempted conveyance of either is binding on her unless it is executed with due formality, and in substantial conformity to the requirements of the statute.

*Waddell v. Weaver*, 42 Ala. 293; Bish. on Mar. Wom. § 601; *Cross v. Everts*, 28 Tex. 523; Thomp. Homest. & Exemp. § 491. The wife possesses no authority to convey except in the mode prescribed by the statute. Her power to sell and convey is a statutory power, and a court of equity has no jurisdiction to aid the defective execution of such a power by supplying elements of form made prerequisite by statute to its valid execution.—*McBryde v. Wilkinson*, 29 Ala. 662; *Tiernan v. Poor*, 19 Amer. Dec. 225, NOTE, p. 230; *Blythe v. Dargin*, 68 Ala. 370; *Gebb v. Howell*, 40 Md. 387. For these reasons equity will refuse to enforce the specific performance of a married woman's contract to convey real estate, whether made alone or by uniting with her husband, where her power to convey is derived from the statute. Nor will it any more intervene to give effect to an instrument executed by her, which is inoperative for want of compliance with a statutory requirement. *Pilcher v. Smith*, 2 Head (Tenn.), 208; *Carr v. Williams*, 10 Ohio, 305; Contr. of Mar. Wom. (Kelly) 100–105; *Holland v. Moon*, 39 Ark. 120.

The case at bar can scarcely be held to come within the foregoing principle. It is not a case of specific performance, nor one where the jurisdiction of equity is invoked to correct any defect in the form or mode of execution of the conveyance. The mortgage sought to be reformed is executed and acknowledged with every formality, and in the precise mode required by statute; and the wife has given her voluntary signature and assent to it by privy examination before the proper officer. A mistaken description only is sought to be corrected. The tract of land purporting to be conveyed, and described in the mortgage, is stated to contain one hundred and eighty acres, and is described as including the family residence of the grantors, their stables, and other improvements and buildings on said lands. The reformation in description, which is prayed for in the bill, does not seek to increase the amount of these lands in acreage, nor to locate them in a different section, but to correct an admitted imperfection in the designation of it by erroneous land numbers belonging to the same section.

We need not hold that equity will undertake to reform a conveyance by a *feme covert*, where the ratification sought requires an order at the hands of the court for re-execution, or such reformation operates strictly as the creation of a new conveyance. It may be admitted that, if this were a case of the latter kind, the chancery court could not act upon the will of a married woman by compelling her assent. It would be absurd to say that this

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was a voluntary assent.—*Knowles v. McCamly*, 10 Paige, 342. Hence, it has been properly held that where the wife joins her husband in a deed, but her name is omitted from the granting clause, chancery will not correct the mistake in the instrument of conveyance by compelling the execution of a perfect deed. *Purcell v. Goshorn*, 17 Ohio, 105. The purpose here sought to be effected is simply to judicially determine what the parties have in truth and fact done, at least in equity—to insure, in other words, a more perfect identification of the premises, and not to change the subject-matter of the contract.—Lead. Cases in Eq. 1002. It is not the function of the equity of reformation to directly restore the grantee to the dominion and possession of the land inaccurately described, but “to place him in a position which enables him, if necessary, to assert his dominion and recover possession.”—3 Pomeroy’s Eq. Jur. § 1375.

It has been held in many adjudged cases that a court of equity will correct a mistake in the description of property contained in a deed executed by a married woman, although the authorities on this point are conflicting. The rule has been declared by the Supreme Court of Indiana “to be a sound one, having its foundation in reason and principle.” Such a reformation, it was said, created no new contract, and added no additional obligations. “It simply puts in the instrument what, in legal effect, was already there, the true description of the property. The instrument is only the evidence of the contract; and reforming the evidence so as to make it accurately and truly describe the property, is not making an executed contract out of an executory one.” “Causing the true description to be written in the deed,” it is added, “neither makes a new conveyance, nor alters an old one; it simply makes the conveyance effective by applying it to the property sold by one party and bought by the other.”—*Styers v. Robbins*, 76 Ind. 547. In *Hamar v. Medsker*, 60 Ind. 413, the married woman’s deed was perfect in the formality of execution, the only defect being in the description of the land sold and intended to be conveyed. The court there said: “By the reformation of the deed and the correction of the mistake, the object and policy of the statute are not contravened or thwarted. A deed has been executed by the wife, in conjunction with her husband, for the land intended to be conveyed. This satisfies the requirements of the statute, and the title of the purchaser ought not to be defeated in the description of the land to be thereby conveyed.” See also *Carper v. Munger*, 62 Ind. 481.

In *Houx v. County of Bates*, 61 Mo. 391, where a county commissioner, in making sale of land under a statutory power, executed a conveyance in due accordance with the provisions of the statute, while it was admitted that a court of equity

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could furnish no relief in aid of the defective execution of a statutory power, the court, on petition filed invoking its equity jurisdiction, allowed a mistake to be corrected in the deed, by which the property sold was misdescribed as certain "lots" instead of "blocks." It was thought that perfecting the identification of the land sold, by correcting the mistaken description, in no wise contravened either the letter or spirit of the statute, nor violated any principle of equity jurisprudence.

There are cases opposed to this view, but we are of opinion that they do not announce the better doctrine.—*Leonis v. Lazzarovich*, 55 Cal. 52; *Martin v. Hargardine*, 46 Ill. 322. We see no reason why a technical rule of law should be so far extended beyond the reason of its existence, as to facilitate the dishonest annulment of contracts, which are executed according to due forms of law, and are binding in equity and good conscience.

The decree of the chancellor is erroneous and must be reversed, and the cause remanded.

## Barton v. Barton.

### *Bill in Equity for Reformation of Conveyance of Land.*

1. *Bona fide purchase; proof of.*—The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment, it being affirmative defensive matter, in the nature of confession and avoidance; but this done, he need not go further, and prove that he made such purchase and payment without notice. The burden here shifts, and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof that before the payment the purchaser had actual or constructive notice of the equity or lien asserted, or of some fact or circumstance, which was sufficient to put him on inquiry, and which, if followed up, would have discovered the equity or incumbrance.

2. *Sworn answer to bill in equity; when not evidence.*—An answer to a bill in equity, though sworn to, is worthless as evidence, in so far as it sets up independent matter—matter not responsive to any averment in the bill.

3. *Judgment; no evidence of debt, as against strangers.*—The recovery of a judgment founded on a debt is evidence of the existence of the debt only as against the defendant in the judgment, and those coming subsequently into privity with him; as against strangers, the recovery establishes nothing.

APPEAL from Macon Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity, exhibited by John K. Barton and



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Clara J. Barton against A. A. Barton, the husband of the said Clara J. Barton, and A. P. Lockard, seeking the reformation of a conveyance of land executed by A. A. Barton to John K. Barton, as trustee for Clara J. Barton, so as to correct an alleged misdescription in the land intended to have been conveyed. The facts disclosed by the record are sufficiently stated in the opinion.

On the hearing, had on pleadings and proof, the chancellor was of the opinion that the complainants were not entitled to relief, and caused a decree to be entered, dismissing the bill; and that decree is here assigned as error.

S. B. PAINE and W. C. BREWER, for appellants, cited *Wynn v. Rosette*, 66 Ala. 520; *Craft v. Russell*, 67 Ala. 9; *Hooper v. Strahan*, 71 Ala. 75.

R. H. ABERCROMBIE and J. A. BILBRO, *contra*, cited *Henderson v. Henderson*, 67 Ala. 519; *Fash v. Ravesees*, 32 Ala. 451; *Saffold v. Wade*, 51 Ala. 214; *Thames v. Rembert*, 63 Ala. 561.

STONE, J.—We will first consider this case in its primary aspect—as an application by Mrs. Clara J. Barton and her trustee to correct a mistake, alleged to have been committed in the draught of a deed, made for her benefit on 21st September, 1866, by A. A. Barton, her husband. We say, we will first consider this, as a question between Mrs. Barton and her husband, without reference to any other claimant.

The bill alleges that the lands were purchased by A. A. Barton, title taken to himself, but paid for with moneys, the statutory separate estate of his wife, given to her after 1848 by her father, Isaac Ross. The lands so purchased, and conveyed to A. A. Barton, are the south half of section 6, and the west half of section 7, township 15, range 23, in Macon county, Alabama. Reciting these facts, the deed from A. A. Barton to John K. Barton, trustee for Clara J. Barton, conveyed lands corresponding in section and township numbers with those above, but describing them as in range 22. The bill then avers that the intention was to convey the identical lands that were purchased by, and conveyed to A. A. Barton, described above, and that by mistake, they were described as in range 22, when it should have been range 23, their true number. The prayer is, that the deed be reformed, so as to describe truly the lands sold and intended to be conveyed. The testimony substantially proves all the foregoing averments of the bill, and, as between Mrs. Barton and her husband, entitles her to relief. The record, in the probate office, corresponds with the numbers expressed in the deed.

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The defendant, A. P. Lockard, pleads in bar of the relief prayed, that he, without any notice that there had been any mistake in Barton's conveyance, purchased the same lands in good faith, at a sheriff's sale made under execution in his own favor, paid the purchase-money, and received the sheriff's conveyance, conveying to him all the right and title of the said A. A. Barton in said lands; and he thus claims that he is a *bona fide* purchaser, without notice of Mrs. Barton's equity. We need not, and do not consider the sufficiency of this plea as pleaded.

The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment. This is affirmative, defensive matter, in the nature of confession and avoidance, and the burden of proving it rests on him who asserts it. *Ei incumbit probatio, qui dicit*. This done, he need not go further, and prove he made such purchase and payment without notice. The burden here shifts, and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof, that, before the payment, the purchaser had actual or constructive notice of the equity or lien asserted, or, of some fact or circumstance, sufficient to put him on inquiry, which, if followed up, would discover the equity or incumbrance.—*Craft v. Russell*, 67 Ala. 9, which collects the authorities: *Taylor v. A. & M. Asso.*, 68 Ala. 229; *Cresswell v. Jones*, *Ib.* 420.

Has Lockard proved the truth of his plea, that he had purchased, and paid the purchase-money? The only testimony he offered in support of it, as noted, or found in the record, was the answers to the bill, the sheriff's deed, and a memorandum from the sheriff's docket, in which the sheriff set forth that he had advertised and sold, and how he had applied the purchase-money. The answer, though sworn to, not being responsive to any averment in the bill, so far as this question is concerned, was the assertion of independent matter, of the truth of which it was worthless as evidence.—*Rembert v. Brown*, 17 Ala. 667; *Wynn v. Rosette*, 66 Ala. 517.

The defendant, Lockard, offered no proof, as against Mrs. Barton, that he was a purchaser. If he had shown a judgment against A. A. Barton, execution upon it, and sheriff's sale and conveyance under it, all by a certified transcript of the proceedings, this would have furnished evidence of a debt due from A. A. Barton, against no one in the world except himself, and those coming subsequently into privity with him. As against strangers to that recovery—and all are strangers except parties to the record, and those coming in subsequently by purchase, or succession,—the recovery established nothing. The fact remained to be proved, as any other material fact must be proved.

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*Lee v. Campbell*, 61 Ala. 12; *Walker v. Elledge*, 65 Ala. 51; *Carver v. Eads*, *Ib.* 190. So, there is an entire failure of proof that Lockard stands in the relation of purchaser, and his plea must fail on that ground.

The result of what we have said is, that the complainant is entitled to the relief she prays. It is therefore ordered and decreed that the decree of the chancellor be, and is hereby reversed; and this court, proceeding to render the decree the chancellor should have rendered, doth order and decree that the deed from A. A. Barton to John K. Barton, trustee for Clara J. Barton, bearing date September 21st, 1866,—the same attached as “Exhibit A” to the original bill in this cause—be reformed and corrected by striking out twenty-two where it occurs in the deed, as descriptive of the range, and inserting, by interlineation, in lieu thereof, the words “twenty-three;” and the register is charged with the execution of this duty. And he will note on the margin that the alteration is made pursuant to the order of court, and sign the same officially.

And the appointment of Ross Barton, as trustee in said deed, instead of John K. Barton resigned, is hereby approved and confirmed.

Let the costs of the original suit be paid, one half by the complainants, and the other half by defendant A. P. Lockard; the costs of appeal in this court and the court below, to be paid by A. P. Lockard.

Reversed and rendered.

## Alley v. Daniel.

### *Trespass de Bonis Asportatis.*

1. *Exemption of personal property when debtor owns less than \$1000 worth; no selection required.*—While the law casts upon a debtor owning personal property exceeding one thousand dollars in value, the duty of selecting that which he will retain as exempt from levy and sale under legal process for the payment of debts, if he has not personal property exceeding in value one thousand dollars, a selection is unnecessary, the law, without the doing of any act on his part, intervening and attaching the right of exemption as absolutely and unconditionally as if the particular property was specially designated and declared exempt.

2. *Same; sale of can not be impeached as fraudulent.*—A sale or other disposition of property which is by law exempt from the payment of debts, can not be impeached by creditors as fraudulent; and hence, where a debtor, whose personal property is of less value than one thousand dollars, makes a sale of all of it, the sale can not be impeached for



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fraud, although it was made for the purpose of hindering, delaying and defrauding his creditors.

3. *Right to an exemption of personal property; when not waived.* While an exemption of property from levy and sale for the payment of debts is a personal privilege, which the debtor may waive, or may lose by the failure to claim it before a sale under legal process, of which he is informed, the right is not waived or lost by a mere failure to make or file a claim or declaration of claim before there is a levy of the process.

4. *Trespass against officer levying process; knowledge of plaintiff's claim as showing malice.*—Ordinarily, the fact that a sheriff or other ministerial officer, acting under legal process, seizes property with a knowledge that it is not subject to seizure, either because it is the property of a stranger, or because it is exempt by law, is a circumstance indicative of malice, or of that degree of recklessness which is the equivalent of malice; and, in an action of trespass against him, evidence of the fact is admissible, that the jury may determine whether they will award vindictive, in addition to actual damages.

5. *Same; when knowledge of plaintiff's claim immaterial.*—But where the officer seizing the property is indemnified, it being his duty to proceed, although he may know that the property is not subject to the process, evidence of such knowledge on his part is irrelevant and inadmissible. In such case, if the officer acts in good faith, and there are no circumstances of aggravation, no facts indicative of a bad motive, nothing more than information that the property is not subject to the process, compensatory damages alone can be recovered.

*Same; evidence of knowledge.*—But in cases where the officer's information or knowledge is material, the practice of introducing *ex-parte* affidavits made by the plaintiff and others, and exhibited to the officer prior to the sale, for the purpose of proving such information or knowledge, is questioned.

7. *Same; when charge in reference to vindictive damages objectionable.* In trespass *de bonis asportatis*, a charge in reference to vindictive damages, which gives to the jury a discretionary power to award them, without stint or limit, and which leaves the jury without any rule whatever by which to award them, is objectionable.

APPEAL from Greene Circuit Court.

Tried before Hon. S. H. SPROTT.

This was an action of trespass, brought by Louis G. Daniel against John Alley, to recover damages for the alleged wrongful taking by the defendant of certain goods and chattels, the property of the plaintiff. As recited in the bill of exceptions, the cause was tried "upon the plea of the general issue, with leave to give in evidence any special matter of defense;" the trial resulting in a verdict and judgment for the plaintiff.

The defendant, at the time of the alleged trespass, was sheriff of Greene county; and the seizure complained of was made by him under and by virtue of a writ of attachment which had been duly sued out and issued against one Bell, under whom the plaintiff claimed title by purchase. The purchase was attacked on the ground of fraud, and much testimony was introduced by both parties on the issue of fraud *vel non*, not necessary to be here set out. The material facts disclosed by the evidence, and the rulings of the court to which exceptions were reserved, are sufficiently stated in the opinion, except that

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it may be well to set out the charge given at the request of the plaintiff, and referred to in the opinion. That charge is in these words: "That to authorize the jury to give exemplary damages, it is not necessary that the levy should have been made in a rude or angry manner; but if it was clearly made to appear to the sheriff, immediately after the levy, and before the removal of the goods from the house, that the property was in truth and in fact the property of Daniel, and that the sheriff, in defiance of such information, carelessly or recklessly seized the goods, and sold them, to the injury of Daniel or his business, then these facts would authorize exemplary damages, if the jury see proper to give them."

The rulings to which exceptions were reserved, indicated in the opinion, are here assigned as error.

WM. P. WEBB, J. P. McQUEEN and GREENE B. MOBLEY, for appellant.

HEAD & BUTLER, *contra*.

BRICKELL, C. J.—The admission of evidence that, at the time of the sale under which the plaintiff claimed title to the goods in controversy, the vendor, Bell, a resident of the State, had not, including the goods, personal property of the value of one thousand dollars; the instruction given the jury by the court, that in the event such was the fact, the sale was not impeachable for fraud by the creditors of the vendor; and the instruction requested by the defendant, and refused by the court, asserting that the property was subject to levy and sale, unless before the levy of the attachment the vendor had made and filed a claim of exemption, may be taken and considered in connection.

There can be no doubt, that if a debtor owns personal property exceeding in value one thousand dollars, the law casts upon him the duty of selecting that which he will retain, exempt from levy and sale under legal process for the payment of debts. This is apparent from the words of the Constitution, and of the statutes enacted for the execution of the constitutional provisions. It is not intended that a debtor shall hold a mass of personal property, exceeding in value one thousand dollars, protected from levy and sale for the payment of debts. Upon the plainest considerations of right and justice, in that event, he should, by some notorious act, elect which he will retain, and which he will yield to the demands of his creditors. The right and privilege of choosing, of selecting, of designating the particular property which he will retain, is conferred; and it must be exercised before there is a sale under legal

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process, if of the levy and sale he is cognizant.—*Ross v. Hannah*, 18 Ala. 125. But if he has not personal property, exceeding in value one thousand dollars, a selection is unnecessary; there is neither room nor reason for it. The law intervenes and attaches the right of exemption, without the doing of any act on his part; attaches the exemption as absolutely and unconditionally as if the particular property was specially designated and declared exempt. For the policy and spirit of the Constitution is, that personal property shall be absolutely exempt, unless the debtor owns of that species property exceeding in value one thousand dollars.—*Thompson on Homestead & Exemptions*, § 833.

A sale or other disposition of property which is by law exempt from the payment of debts, can not be impeached by creditors as fraudulent; as intended to hinder or delay them. They can have no concern with it, for the property was not, in the hands of the debtor, subject to their demands, and, as to them, his power of disposition is unlimited.—*Fellows v. Lewis*, 65 Ala. 343; *Lehman v. Bryan*, 67 Ala. 558; *Wright v. Smith*, 66 Ala. 514. The main point of contention in the court below seems to have been, whether Bell did not make the sale for the purpose of hindering, delaying and defrauding his creditors. That inquiry was immaterial, and the contention unavailing, if, at the time of the sale, all his personal property was of less value than one thousand dollars. There was, of consequence, no error in the admission of the evidence, or in the instruction upon this point given to the jury.

Nor was there error in the refusal of the instruction requested by the defendant. The right to an exemption of personal property is not dependent upon the making claim or filing a declaration of claim before a levy, or other effort to subject it to the payment of debts. The exemption is a personal privilege, which the debtor may waive, or which he may lose by the failure to assert it before a sale under legal process, of which he is informed. But the right is not waived or lost by a mere failure to make or file a claim, or declaration of claim, before there is a levy.—*Jordan v. Autrey*, 10 Ala. 276; *Gresham v. Walker*, *Ib.* 370; *Ross v. Hannah*, 18 Ala. 125. The statute authorizes the making claim and filing declaration of it for record in the office of the judge of probate. The only effect of the filing and registration is, if the validity of the claim is contested, to furnish *prima facie* evidence of its correctness, compelling a creditor impeaching it to become the actor in the contest, and shifting to him the *onus* of proof.—Code of 1876, §§ 2828–31. The statutes go further, and in express terms declare the failure to file the declaration is not a waiver of the



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exemption, but that the debtor may claim whenever there is a levy of process.—Code of 1876, § 2834.

Generally, in an action of trespass *de bonis asportatis*, or in an action of trespass for an injury to chattels, the measure of damages is the value of the goods taken and carried away, or the diminution in value resulting from the injury, with interest computed to the day of trial. Special damages, if not too remote, may also be recovered.—Woods' Mayne on Damages, 515; Sedgwick on Damages (6th Ed.), 663. Exemplary or vindictive damages, as they are indifferently termed, may also be recovered, if the trespass is committed with a bad motive, with an intent to harass, or oppress, or injure; and the fact that it is wantonly, recklessly, or knowingly committed, is a circumstance indicative of malice, and proper matter for the consideration of the jury.—*Devaughn v. Heath*, 37 Ala. 595; *Lienkauf v. Morris*, 66 Ala. 406. The trespass now complained of consists wholly of the seizure of goods under attachment by the defendant as sheriff, who was indemnified by the party controlling the process to make the seizure or levy and a consequent sale. The fact that the defendant was indemnified, and was acting in obedience to the instructions of the indemnitor, was uncontroverted. *Ex-parte* affidavits, made by the plaintiff, and by witnesses who were examined on the trial in the court below, which subsequently to the levy had been exhibited to the defendant, were introduced against his objection, for the purpose of showing notice to him of the plaintiff's claim to the goods, and of the claim that, while in the hands of the vendor, Bell, they were absolutely exempt from liability to his debts, the court instructing the jury, that the affidavits were not admissible as evidence of the facts stated in them, or for any other purpose than showing notice to the defendant. If the fact of notice had been material and relevant, this mode of proving it is of exceedingly questionable propriety. The affidavits were of no more force, entitled to no more credit, than the unsworn declarations of the witnesses; and yet they were permitted to pass to the jury for examination upon their retirement. If such a practice can be pursued, it is not of difficulty to foresee that, under the pretext of proving one fact, a party may get before the jury illegal, irrelevant evidence, which may affect the verdict, however positive may be the instruction of the court, that it must be disregarded. The practice of admitting illegal or irrelevant evidence, subject to its exclusion by the court, if there is not subsequently evidence introduced, rendering it legal or relevant, has been often condemned, and it is subject to condemnation because of the difficulty of eradicating from the minds of the jury the impressions made by it, however direct and positive may be the instructions of the court

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that it must be disregarded.—1 Brick. Dig. 809, § 89. Waiving a consideration of the admissibility of the affidavits for the purpose for which they were received, the fact of notice to the defendant of the plaintiff's claim or title to the goods, and that in the hands of Bell they were exempt from liability for his debts, was wholly immaterial and irrelevant, unless it had been connected with the evidence of other facts, which would have authorized a verdict for exemplary damages. If the title to the goods resided in the plaintiff, and he had possession at the time of the taking, he was entitled to a verdict for the value of the goods, with interest to the day of trial, whether the defendant had or had not notice or knowledge of his right. The fact of notice or knowledge could not strengthen the title or claim of title, nor add to the measure of recovery.

The fact that a sheriff or other ministerial officer, acting under legal process, seizes property with knowledge that it is not subject to seizure, either because it is the property of a stranger, or because it is exempt by law, is a circumstance indicative of malice, or of that degree of recklessness which is the equivalent of malice, and, in an action of trespass against him, evidence of the fact is admissible, that the jury may determine whether they will award vindictive, in addition to actual damages. But there are cases in which the fact is wholly immaterial, because it is the duty of the officer to proceed to the seizure, or having made it, to complete it by a sale, though he may know the property is not subject to the process. That is a fact which the parties interested in the execution of the process have the legal right to contest before the judicial tribunals, unaffected by facts lying in the knowledge of the officer. The statute authorizes the officer to demand from them indemnity, if there is doubt as to the liability of the property to seizure or levy, or if of the fact of liability there is dispute. When the indemnity is given, the officer is without discretion; he must proceed in the execution of the process; without, to say the least, incurring the hazards of litigation with the indemnitors, in which the burden of proving that the property was not subject to the process would be cast upon him, he can not refuse to levy, or having made the levy, to complete it, however cogent may be the evidence furnished him, that the property is not from any cause subject to levy and sale.—Crocker on Sheriffs, § 446; Code of 1876 §§ 3196, 3285. If after indemnity he should proceed to a levy, or to execution of the process, rudely, insultingly, or in an aggravated manner, indicative of malice, or of an intent to harass, or oppress, or injure, he would be answerable for vindictive damages. A bad, malicious intent, in the commission of a trespass, is always proper matter for the consideration of a jury; for a man acting tortiously

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with such an intent ought, in justice, to be dealt with more harshly, than a man who acts ignorantly, without such intent. But when a public officer is in the line of duty, acting in obedience to process, which he can not with safety refuse to execute, whatever may be his information or knowledge of facts, which, if proved in the course of a judicial investigation, will subject him to liability as a trespasser, it would savor of harshness and oppression, if his liability was increased by the addition of vindictive damages because of such knowledge or information. Acting in good faith, under instructions and indemnity from the party controlling the process, who is in pursuit of his supposed legal rights, if there are no circumstances of aggravation, no facts indicative of a bad motive, nothing more than information that the property is not subject to the process, the value of the property taken, with interest to the time of the trial, is the only reparation he can be required to make; this is full compensation to the owner, and all he can in good conscience demand.—*Lienkauf v. Morris*, 66 Ala. 406; *Pacific Insurance Co. v. Conard*, 1 Baldwin, 138; *Phelps v. Owens*, 11 Cal. 22. The introduction of these affidavits for any purpose was illegal; evidence of the fact they were intended to prove was irrelevant. The case before the court was one for the recovery of compensatory damages only, as was clearly and conclusively shown. The instruction given at the request of the plaintiff, in reference to vindictive damages, is in itself objectionable. It gives to the jury “a discretionary power, without stint or limit, highly dangerous to the rights of the defendant;” it leaves them without any rule whatever. But it is not necessary to consider the instruction specially.

For the error pointed out, the judgment must be reversed and the cause remanded.

### *Ex parte Murphy.*

#### *Application for writ of Habeas Corpus.*

1. *Habeas corpus by father for custody of child; when properly refused.* Where, on the hearing of an application by a father for a writ of *habeas corpus*, to obtain the custody of his child from the latter's maternal grandmother, with whom he had been left by a dying mother, in the absence of the father in a distant State, it is shown that the child was sick, requiring and receiving the tenderest nursing, and that the child's sickness would render it at least perilous to attempt his removal, his sickness is a sufficient reason for refusing the relief sought.

2. *Same.*—Should, however, the child's health become established,



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the application can be renewed; but it further appearing that the father had been intemperate, and evidence introduced on his behalf tending to show that he had reformed, it would seem that a sufficient time should be allowed to elapse, to test the fact and sincerity of the father's reformation, the welfare of the child being the paramount inquiry.

APPLICATION to this court for writ of *Habeas Corpus*, the same having been refused by Hon. THOS. L. FRAZER, Judge of Probate of Lee county.

The facts are stated in the opinion.

Names of counsel for respective parties not disclosed by the record.

STONE, J.—This was an application by *habeas corpus*, sued out by the father, to obtain possession of his infant male child, about twenty months old. The child is in the possession of his maternal grandmother, with whom he was left by his dying mother, then living apart from her husband. The judge of probate denied relief, and left the child with his grandmother. The present is an appellate application, to obtain a review and reversal of the probate judge's ruling. The writ was sued out before the probate judge, November 27th, 1883, and was heard by him a few days afterwards, on oral proofs.

About July or August, 1882, petitioner went to Texas, leaving his wife and infant son with her mother, Mrs. Dickens, the respondent in this suit. Petitioner did not return to Alabama until ten days or two weeks before he filed his petition in this cause. He was with his father, a well-to-do farmer of moderate means, who had employed him to labor and live with him the then next, now present year, and agreed to furnish a home to him and his child. The mother of the child died while the father was absent in Texas. There is no conflicting testimony on the following subjects of inquiry: That both the grandmother Dickens, and the grandparents Murphy, are able to maintain and support the child, and are suitable persons to have its custody; that the child is a very delicate one, requiring and receiving the tenderest nursing from its grandmother, and that, at the time of the trial, he was sick in bed, too sick to be brought before the court; and, for several months before he went to Texas, it is shown the father was quite intemperate. The proof is, that before that time he was temperate, moral and industrious. There is no testimony that the petitioner has any means or property of his own.

On the following questions there was conflict in the testimony: First, whether he deserted his wife, or she deserted him; second, whether at the time of the separation, he was supporting his wife and child; and third, whether on the day

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he sued out the writ of *habeas corpus*, the petitioner was drunk in the city of Opelika. He swore on the trial that since leaving for Texas, he had reformed, and was a sober man. The judge of probate, as shown in his sworn return, states the first and third of the above inquiries, namely, that he had deserted his wife and child, and was drunk in Opelika on the day he sued out the writ, were proven before him. The witnesses were examined in the presence of the judge of probate, and he had much better opportunities of judging of their intelligence and credibility than we can have.—*Nooe v. Garner*, 70 Ala. 443. The sickness of the child at that time, rendering it at least perilous to attempt his removal, was itself a sufficient excuse for refusing the relief prayed for. Should the child's health become established, the application can be renewed; but it would seem that a sufficient time should be allowed to elapse to test the fact and sincerity of the petitioner's reformation. The welfare of the child is the paramount inquiry.—*Ex parte Boaz*, 31 Ala. 425; Schouler on Dom. Rel. 340 *et seq.*; *Brinsster v. Compton*, 68 Ala. 299.

Writ of *habeas corpus* denied.

## Shealy & Finn v. Edwards.

### *Trespass de Bonis Asportatis.*

1. *Trespass against sheriff for levying attachment; admissibility of evidence.*—On the issue of fraud *vel non* in the sale of a stock of goods, in an action of trespass *de bonis asportatis* brought by the purchaser against a sheriff who had levied an attachment on the goods as the property of the vendor, the fact that possession of the goods had been delivered to the plaintiff, and that sales from the stock had been made by his clerk in due course of trade, prior to the levy of the attachment, is relevant evidence for the plaintiff, as tending to show a *bona fide* ownership of the goods; but an itemized list of the goods sold by the clerk is immaterial, and is properly excluded from the jury.

2. *Same; when attachment proceedings competent for sheriff.*—In such case, the papers and record in the attachment suit, including an order for the sale of the attached goods, and a judgment in favor of the attaching creditor, are competent evidence for the sheriff. While the judgment may not be competent to prove the existence of the debt on which it is based, it is admissible for the purpose of showing that the lien created by the levy of the attachment had been perfected in the manner prescribed by law; and if the plaintiff desires to limit its effect, he should request an appropriate charge.

3. *Sale of property by debtor; what necessary to render fraudulent.* To render a sale of property by a debtor fraudulent as against creditors, it must be shown that the transaction was infected with a fraudulent

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intent on the part of the debtor, and that in such intent the purchaser participated.

4. *Same ; evidence of fraudulent intent.*—The fraudulent intent of the debtor may be shown by his conduct and declarations, so immediately connected with the transaction as to throw light upon, or illustrate its nature; but such conduct and declarations are inadmissible against a purchaser for value, unless they are so intimately related to the principal fact, which is assailed as fraudulent, as to constitute a part of the *res gestæ*, or were brought to his knowledge prior to the purchase.

5. *Same ; proof of purchaser's participation in fraudulent intent.*—The participation of the purchaser in the fraud may be shown by proof of such fact or facts as are sufficient to charge him with notice of the debtor's fraudulent intent; and for this purpose, knowledge on his part of facts which, however general in their nature, are sufficient to put him on inquiry, by reasonably exciting in his mind a just suspicion as to the honesty or *bona fides* of the transaction, is sufficient.

6. *Same.*—Transfers by the debtor to his father and sister of promissory notes given by the purchaser for a stock of goods sold on a credit, made several days after the sale, without the purchaser's knowledge, are not admissible as evidence against him on the issue of fraud *vel non* in the sale of the goods.

7. *Badge of fraud ; burden of proof, when not shifted.*—It can not be asserted, as a general rule, that every badge of fraud, casting suspicion on the good faith of a transaction, shifts the burden of proof upon the party claiming under it, so as to require him to explain it; and that, in the absence of explanation, such transaction is to be necessarily pronounced fraudulent.

8. *Right of debtor to prefer creditors.*—A debtor is not forbidden by law to make an honest preference of creditors in the payment of his debts, provided he does so without any intent to hinder or delay his other creditors.

9. *Sale ; when not vitiated for fraud.*—Where a sale by a debtor is entirely free from all imputation of fraudulent intent, it is not sufficient to vitiate it, that its natural result was to hinder, delay or defraud his creditors.

10. *Sale fraudulent as to creditors, valid inter partes.*—A sale of property by a failing or insolvent debtor, though consummated with a fraudulent intent, is valid as between the parties; and is invalid only as to complaining creditors whose legal rights have been thereby prejudiced.

11. *Badges of fraud ; when charge in reference to, invades province of the jury.*—A charge asserting that designated badges of fraud, when taken together, raise a "violent presumption" of a secret trust in favor of a debtor who has made a conveyance of his property, invades the province of the jury, and is, for that reason, erroneous.

APPEAL from Talladega Circuit Court.

Tried before Hon. LEROY F. BOX.

This cause was before this court at a former term, and is reported. See 73 Ala. 175. It was an action of trespass, brought by Shealy & Finn against Joseph A. Edwards, Joseph Hardie and others, to recover damages for the seizure and asportation of certain goods, wares and merchandise, and was commenced on 19th January, 1882. The defendants filed a joint plea of not guilty, and the defendant Edwards also filed a special plea, alleging, in substance, that the goods, wares and merchandise described in the complaint were levied on by him as sheriff of



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Talladega county, under an attachment issued out of the circuit court of that county, at the suit of Joseph Hardie against Terrell & Vincent; and that at the time of said levy, said chattels were the property of the defendants in attachment. The cause was tried on issues joined on these pleas, the trial resulting in a verdict and judgment for the defendants.

As the plaintiffs' evidence, introduced on the second trial, "tended to prove," on 9th December, 1881, they purchased from Terrell & Vincent, merchants, in the town of Talladega, the stock of goods in controversy, being the latter's entire stock, consisting principally of new goods, for \$2750, for which they executed three promissory notes, two for \$1000 each, and the other for \$750, payable to Terrell & Vincent or bearer twelve months after date; and about eight o'clock p. m. of that day the goods, with the storehouse, were delivered to the plaintiffs. It was, however, "understood and agreed between the parties, that the new goods should be taken at the invoice prices, and the old goods should be valued and taken at what they were fairly worth, and they were to commence the invoice the following Monday; and if they amounted to less than \$2750, the notes were to be credited with the difference; if to more, the excess was to be paid by the note of Shealy & Finn to Terrell & Vincent, at twelve months." Shealy was in Talladega on Monday to take the invoice, but found the defendant Edwards in possession. On the day following the sale, a clerk of the plaintiffs, who was in charge of the store and goods, opened the store, and sold goods for the plaintiffs all that day, and kept an itemized list of the articles sold by him. The plaintiffs offered this list in evidence, but, on defendants' objection, it was excluded, and they excepted. The plaintiffs' evidence further tended to show their ability to pay for the goods; that the purchase was made in good faith, for the purpose of selling again at retail, and without any knowledge, on their part, of the pecuniary condition of Terrell & Vincent, or of their indebtedness, or that they were in failing circumstances; that the goods were levied on by the defendant Edwards, as sheriff of Talladega county, early Monday morning following the purchase, under the attachment mentioned in said defendant's special plea, and were by him afterwards sold. The value of the goods was also shown.

The evidence introduced on behalf of the defendants tended to show that, at the time said purchase was made, Terrell & Vincent were largely indebted, were in failing circumstances, and the plaintiffs then knew their pecuniary condition; that the cash value of said stock of goods was \$3500; and that "in making said sale of the goods in question, Terrell & Vincent intended to hinder, delay and defraud their creditors, and the

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plaintiffs knew of that intention, and that they intended to aid them in their intention, by making said purchase; but as to the intention to defraud, and plaintiffs' knowledge thereof, and participation therein, "the evidence offered by plaintiffs and defendants was conflicting." The papers relating to the attachment sued out by Hardie against Terrell & Vincent were read in evidence, and the issue and levy of the attachment, and the existence of the debt on which it was founded, were shown. The defendants were allowed, against the plaintiffs' objection, to read (1) an order made in the attachment suit for a sale of the goods, and (2) a judgment rendered in said suit in favor of Hardie against Terrell & Vincent; and to these rulings the plaintiffs duly excepted. The defendants were also allowed to prove, against the plaintiffs' objection, that "in a few days after the sale and delivery of the goods to Shealy & Finn, Vincent [of the firm of Terrell & Vincent] delivered the note for \$750, and one of the notes for \$1000, which Shealy & Finn had given Terrell & Vincent in the purchase of the goods in question, to his father, John Vincent, and the other note for \$1000 to his sister, Miss Malinda Vincent." To this ruling the plaintiffs excepted. In rebuttal the plaintiffs introduced evidence tending to show that on 9th December, 1881, Terrell & Vincent were indebted to the said John Vincent in the sum of about \$2000, and to the said Malinda Vincent in the sum of \$1000. The bill of exceptions purports to set out all the evidence, the substance of which is stated above.

The court charged the jury, *ex mero motu*, among other things, as follows: 1. "If the defendants show badges of fraud, casting suspicion on the transaction, then the burden of proof shifts, and it devolves on the plaintiffs to explain those badges of fraud, and show the *bona fides* of the sale." 2. "It is sufficient to show that the natural result of the sale was to hinder, delay and defraud the creditors of Terrell & Vincent, in order to shift the burden of proof from the defendants to the plaintiffs on the question of fraud." 3. "If before the notes were paid, and while the plaintiffs were in a condition to put themselves *in statu quo*, the plaintiffs discovered the fraudulent intent of Terrell & Vincent in making the sale, and did not offer to rescind, and put themselves *in statu quo*, you may look to that, in connection with the other evidence, in determining what was their intent at the time of the sale, and whether they participated in the fraud." To each of these charges the plaintiffs excepted. They also duly excepted to the refusal of the court to give the following, among other charges, requested in writing by them: 2. "If the notes alleged to have been executed for the goods in question were payable one year from date, and payable to Terrell & Vincent,

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or bearer, and have since been transferred by Terrell & Vincent in payment of debts to John Vincent and Malinda Vincent, then Shealy & Finn are bound for the payment of said notes; and the fact that Shealy was, on the Monday afterwards, notified of Hardie's attachment, will be no defense to a suit on them." 3. "If the evidence shows you that Shealy & Finn executed their notes in payment for goods, or a part thereof, and that Terrell & Vincent then turned the goods and house over to Shealy & Finn, saying 'now the goods are yours,' then it was a sale, and the title passed, even though the price of certain old goods remained to be agreed upon." 4. "A man or firm in failing circumstances has the right under the law, in good faith, to make a preference in paying his debts; and this is true even though the effect of such *bona fide* preference be to leave other creditors without payment of any part of their demands; and if you find from the evidence that Terrell & Vincent were indebted to John Vincent in the sum of \$1750 or \$2000 for borrowed money and for cotton, and were indebted to Miss Malinda Vincent in the sum of \$1000 for borrowed money, then they, Terrell & Vincent, had the right to prefer those creditors and pay their indebtedness to them; and if the evidence shows you that they did pay them by transferring to them the notes given by plaintiff in payment for the goods in controversy (if you find that such notes were executed and transferred), and did this in good faith, then there was no fraud, and the plaintiffs' title to the goods is valid, and your verdict should be in their favor for the proven value thereof." The plaintiffs also excepted to the following charges given, among others, at the defendant's request. 6. "If Shealy & Finn purchased the entire stock of goods from Terrell & Vincent on credit for less than its value, and, at the time of such purchase, Terrell & Vincent were insolvent and owed debts, such sale to them would be a badge of fraud and [would] raise a violent presumption of a secret trust, and the transaction [should] be scrutinized more closely."

The rulings above noted are, among others, here assigned as error.

PARSONS & PARSONS and HEFLIN, BOWDON & KNOX, for appellants.

BROOKS & ROY, *contra*.

SOMERVILLE, J.—There was clearly no error in the refusal of the court to allow the plaintiffs to read to the jury the full itemized list of articles sold from the stock of merchandise in controversy on the day after they took possession under



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their purchase from Terrell & Vincent. The question at issue was fraud *vel non* in the matter of the alleged sale. They had been allowed to prove the fact of possession, and the fact of sales being made by their clerk in due course of trade. These acts of dominion were relevant as tending to prove *bona fide* ownership. The particular items of sale were immaterial, and tended to prove nothing.

The objection interposed by the plaintiffs to the introduction of the attachment proceedings, and judgment rendered upon them in favor of Hardie against Terrell & Vincent, was entirely without merit. So the order of the court, authorizing the sale of the stock of goods by the sheriff, was clearly admissible. These judicial proceedings were in no sense *res inter alios acta*. They constituted the process under which the alleged trespass by the sheriff was sought to be justified. There was evidence tending to show the sale and purchase of the goods to be fraudulent, and if the jury was satisfied of the truth of this fact, the levy and sale made by the sheriff were fully authorized by law. The judgment was admissible to show that the inchoate lien created by the levy of the writ of attachment was perfected in the manner prescribed by law. It was not introduced to prove the existence of the debt on which it was based. This had been proved by other competent evidence. If the plaintiff desired to limit the effect of the judgment, it should have been done by requesting a proper charge to this end by the court.

It is a familiar principle that where the issue of fraud is involved, a greater latitude is allowed in the range of the evidence. To authorize a conveyance or sale made by a debtor to be pronounced fraudulent, two things must concur. The transaction must be shown to be infected with a fraudulent intent on the part of the grantor, and this must be participated in by the grantee. The first may be shown by the conduct and declarations of the grantor, so immediately connected with the transaction, as to throw light upon or illustrate its nature; this evidence often consisting of a series of acts of more or less significance in their character, antecedent to, contemporaneous with, and even sometimes immediately subsequent to the principal fact. Unless, however, such acts or declarations are so intimately related to the principal fact, which is assailed as fraudulent, as to constitute a part of the *res gestae* of such transaction, they are inadmissible as evidence against one claiming as a purchaser for value, unless shown to have been brought home to his knowledge prior to the purchase.—*Lehman v. Kelly*, 68 Ala. 192; *Moses v. Dunham*, 71 Ala. 173; 2 Brick. Dig. 18, § 71; *Foster v. Hall*, 22 Amer. Dec. 400.

The participation of the grantee in the fraud may be shown

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by proving knowledge of any one or more of the facts sufficient to charge him with notice of the grantor's fraudulent intent. But it is obvious that this principle does not render it necessary to prove the grantee's knowledge of every particular act or declaration of the grantor going to constitute the alleged fraud. Such a requirement would render futile and impracticable all attacks upon fraudulent transfers, in perhaps ninety-nine out of every one hundred cases, in which it might be attempted to assail their validity. It would put a facile means within the reach of parties to destroy the force and admissibility of evidence by the artifice of management. Hence, the law does not require more than a knowledge of facts, which, however general in their nature, are sufficient to put the grantee on inquiry, by reasonably exciting a just suspicion in his mind as to the honesty or *bona fides* of the alleged fraudulent transaction.—*Lehman v. Kelly*, 68 Ala. 192, and cases cited. It is manifest that there may be cases where the fraudulent transfer of property made by the grantor to third persons, at or about the time of the main transaction, would be held admissible, even in the absence of a knowledge of such transaction on the part of the grantee, this being the settled doctrine of many of the courts.—Bump. on Fraud. Conv. (3d Ed.) 583–584, 591. But we are of opinion that the court erred, in the light of the above rules, in admitting evidence of the transfer by one of the grantors, several days after the sale made to the plaintiffs, of the notes taken for the purchase-money of the goods, which transfer he is shown to have made to his father and his sister, without the knowledge of the plaintiffs, and subsequent to their purchase of these goods. *Guidry v. Grivot*, 14 Amer. Dec. p. 195. NOTE.

A badge of fraud has been defined to be a fact which is calculated to throw suspicion upon a transaction, and calling for an explanation.—*Peebles v. Horton*, 64 N. C. 374. In *Terrell v. Green*, 11 Ala. 213, it was said to be an "inference drawn by experience from the customary conduct of mankind." These badges of fraud do not in themselves, or *per se*, constitute fraud, but are rather signs or *indicia* from which its existence may be properly inferred as matter of evidence. They are more or less strong or weak according to their nature and number concurring in the same case. They are as infinite in number and form as are the resources and versatility of human artifice. The present case presents numerous illustrations of many such badges, which are enumerated in the various rulings of the court, with explanations as to their legal force and effect, which seem correct except in one particular. The court erred in charging the jury as to the rule governing the burden of proof in such cases. The weight which is to be

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given badges of fraud is a matter usually for the determination of the jury. "In some cases," as observed by a learned author, "fraud is *self-evident* ; and when so, it is the proper province of the court to *adjudge* upon it."—Bigelow on Fr. p. 468. But it can not be asserted, as a general rule, that every thing which casts suspicion upon the good faith of a transaction, shifts the burden of proof upon the grantee or interested party, so as to require him to explain it, and that, in the absence of explanation, such transaction is necessarily to be pronounced fraudulent. There are numerous badges or *indicia* of fraud which might, although without explanation, entirely fail to satisfy the minds of a jury, that the transaction to which they relate had its origin in a fraudulent intent. There may be a suspicion, in other words, falling far short of satisfactory proof.

In this view of the law the first charge given by the court of its own motion was erroneous.

A debtor is not forbidden by law to make an honest preference of creditors in the payment of his debts, provided he does so without any intent to hinder or delay his creditors. *Crawford v. Kirksey*, 55 Ala. 282 ; *Warren v. Jones*, 68 Ala. 449. Such a transaction must be deemed valid if free from fraud. The fourth charge requested by the plaintiffs asserted this proposition in substance, and should have been given.

It was not sufficient to vitiate the sale that its natural result was to hinder, delay or defraud creditors, provided it was entirely free from all imputation of fraudulent intent. It is not impossible that the transaction may have had this effect, and yet have fully comported with honesty.—*Young v. Dumas*, 39 Ala. 60. The second charge given by the court seems to be inconsistent with this principle, and was misleading, if not erroneous.

The transfer of property by a failing or insolvent debtor, even though consummated with a fraudulent intent, is not for this reason void as between the immediate parties. The law pronounces such transactions invalid only at the instance of complaining creditors, whose legal rights have been prejudiced. The second charge requested by the plaintiffs was misleading on the ground that it assumed, in effect, that the same test would govern the validity of such transfers, whether the question arose between the immediate parties, or between the grantee and the creditors of the grantor.

The third charge requested by the plaintiff was properly refused. The principle of law announced in it is abstractly correct under the authority of the decision made in this cause when last before us on appeal.—*Shealy & Finn v. Edwards*, 73 Ala. 175. But in this case, as now presented, the main issue is one of fraud, and the charge, as framed, utterly ignores



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this consideration, upon which the entire case is made to turn.

The sixth charge, given at the request of the defendants, asserts the proposition that certain concurring badges of fraud, which are specially enumerated, would, taken together, raise a "violent presumption" of a secret trust, demanding a closer scrutiny of the transaction. We understand by a *violent presumption* one which is very strong and forcible, although not one which is necessarily conclusive or irrebutable—an inference which the law unhesitatingly requires to be drawn from given facts—a conclusion quite self-evident from the premises. Taking the phrase in this sense, we are inclined to think that it invaded the province of the jury, and was therefore erroneous.

The other rulings of the court are, in our opinion, free from error.

The judgment is reversed, and the cause remanded.

## Scott v. Field.

### *Action against Mortgagee to recover Statutory Penalty for Failure to enter of Record Satisfaction of Mortgage.*

1. *Action to recover penalty for failure to enter satisfaction of mortgage ; when mortgagee not estopped from denying satisfaction.*—In an action against a mortgagee to recover the penalty provided by the act of March 1st, 1881, amending sections 2222-23 of the Code of 1876, for failure to enter of record satisfaction of a mortgage (Pamph. Acts, 1880-1, p. 32), the defendant is not estopped from denying that the mortgage had been satisfied, by reason of the fact that he had not, within three months after the request to enter satisfaction, commenced a suit involving that question, and, at the time of the request, no such suit was pending.

2. *Same ; how right of recovery affected by usury.*—If the mortgage debt is usurious, and the mortgagor had fully paid the principal before making the request for entry of satisfaction, and of that fact there is no real ground of contestation, no reason for substantial doubt, the mortgagee can not withhold the entry of satisfaction, because the nominal amount of the debt, including the stipulated interest, had not also been paid.

APPEAL from Blount Circuit Court.

Tried before Hon. LEROY F. BOX.

Jason Scott commenced this action on 12th January, 1883, against Abijah E. Fields, to recover the statutory penalty of two hundred dollars for the alleged failure of the defendant to enter of record satisfaction of a chattel mortgage executed by the plaintiff to the defendant on the 14th February, 1881. The cause was tried on the plea of the general issue, the trial

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resulting in a nonsuit by the plaintiff, with a bill of exceptions.

After proof of the execution and registration of the mortgage had been made, evidence was introduced tending to show that the mortgage was executed to secure a note described therein for \$75, the consideration of which was that amount advanced to the plaintiff by the defendant, "for which the plaintiff agreed to pay the defendant, at the maturity of said note, the sum of \$100;" and also additional advances which the defendant agreed to make to the plaintiff; and that after the maturity of the note and the law-day of the mortgage, the plaintiff paid to the defendant the \$75 for which the note was given, and the amount of additional advances secured by the mortgage, but that he had not paid the "interest" on the note "agreed to be paid." It was further shown that the plaintiff had duly requested in writing that satisfaction of the mortgage should be entered on the record; that the defendant had failed to make such entry; and that, "at the time of the service of the written request, nor within three months thereafter, there was not a pending suit between said parties, involving the fact whether the defendant, as mortgagee, had received satisfaction of the debt secured by said mortgage."

This being the substance of the evidence introduced on the trial, the court charged the jury, *ex mero motu*, "that unless the evidence showed them that the plaintiff had paid to the defendant an amount of money, or other things of value, sufficient to satisfy the claim of defendant against plaintiff, both for the money advanced, and the goods sold him under the contract, and the amount of interest agreed to be paid by said plaintiff for the money advanced, the amount secured by said mortgage would not be paid, and they must find for the defendant." To this charge, and to the refusal of the court to give charges requested by him, which are sufficiently set out in the opinion, the plaintiff excepted.

The rulings above noted are here assigned as error.

JOHN A. LUSK, for appellant.—(1) The court erred in the charge given by it *ex mero motu*. The rule that usury is only available in *defense* of an action, is not applicable to this case. (2) The court erred in the refusal to give the charges requested. The defendant was estopped from denying the payment of the debt secured by the mortgage, by his failure, for the space of three months after the service of the notice to enter satisfaction upon the record, to bring suit involving the question, whether he had been paid the mortgage debt, there having been no suit pending at the date of the notice. This point discussed, with citation of following authorities: 29 Kansas, 304; 26 Iowa, 180; 31 Cal. 148; Herm. on Chat. Mortg. 411.

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C. F. HAMILL, *contra*.—(1) It is settled that usury must be specially pleaded; and it is equally as well settled in this State, that the taint of usury does not vitiate a contract, and that a promise to pay usury is not void.—*Bradford v. Daniel*, 65 Ala. 133; *Masterson v. Grubbs*, 70 Ala. 406. In this case the question of usury is not raised by the pleadings. (2) The statute, as amended, expressly provides that it is only after *payment* and request, an action will lie. It does not *require* any suit by the mortgagee. He may sue or not as he pleases. If he sues within the time prescribed, an action can not be maintained by the mortgagor against him for the penalty provided by the statute. If he does not sue, the burden is still on the mortgagor to prove *satisfaction*, request to enter the same, and a failure to do so by the mortgagee, before a recovery can be had by him.

BRICKELL, C. J.—The action is founded on the amendatory statute approved March 1, 1881 (Pamph Acts, 1880–81, p. 32), subjecting a mortgagee, or the assignee or transferee of a mortgage, having received “satisfaction of the amount secured by such mortgage,” to a penalty of two hundred dollars, if, for three months after request in writing by the mortgagor, he fails to enter satisfaction of such mortgage upon the margin of the record thereof, unless, when such request is made, or within said three months, there is a pending suit between the parties involving the fact, whether such mortgage has been satisfied. It will be observed, the statute materially changes the pre-existing statute, forming sections 2222–23 of the Code of 1876. First, a request in writing is now essential to place the mortgagee, transferee, or assignee in default, and subject him to the penalty; a verbal request was sufficient under the former statute. Second, the penalty can not be incurred, if, when the request is made, there is between the parties a suit pending, involving the fact of satisfaction, or if there is, within the period of three months thereafter, the commencement of suit involving the fact. The pendency of such suit prevents the incurring of the penalty, whether the suit is well or illy founded, and whether it is instituted by the mortgagor, or by the mortgagee, or transferee, or assignee. Either may institute a suit, which will involve the fact. The mortgagor may resort to equity for a redemption, or for a cancellation of the mortgage and a reconveyance; or the mortgagee may file a bill for foreclosure, or may sue at law for the recovery of the mortgage debt, or if the subject of the mortgage is land, and the mortgagor is in possession, may sue for the recovery of the possession; or if the subject is chattels, may sue in trover or detinue for their recovery; and these remedies, legal and



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equitable, he may maintain concurrently. The pendency of any of such suits is a fact which prevents, absolutely, the incurring of the penalty; but under the former statute, that was not the force and operation of such a suit, whatever effect, as matter of evidence, in determining the good faith of a refusal to make the entry of satisfaction, could have been accorded to it. The former statute subjected only the mortgagee who had received satisfaction to the penalty, if there was refusal to make the acknowledgment thereof upon the record. The assignee or transferee of the mortgage was not in any event liable to the penalty.—*Grooms v. Hannon*, 59 Ala. 510. The changes wrought by the amendatory statute are obvious, and there is no reason or room for a construction which will extend them beyond the plain signification of the terms in which they are expressed.

The second instruction requested by the appellant affirms that, if the mortgagee does not, within three months after the request to enter satisfaction, commence a suit which involves the fact, and at the time of the request there is not such a suit pending, he is estopped from denying the fact of satisfaction in an action for the recovery of the penalty. The statute is not capable of a construction which will sustain this proposition. The penalty can not be incurred, in any event, unless there has been payment of the mortgage debt, or, in the words of the statute, which are equivalent, "of the amount secured by the mortgage." If there has not been payment of that amount, there is no duty of entering satisfaction imposed by this statute. The purpose of the statute is, that there shall be upon the record an acknowledgment of equal publicity with the record itself, that the mortgage is satisfied; that it is no longer an available security, or an incumbrance upon the title of the mortgagor. The institution of suit involving the fact of satisfaction, if the fact is matter of dispute, of which each party is cognizant, is not more the duty, moral or legal, of the one party than the other. It would seem, if there was real, honest disputation of the fact, that it would quicken the diligence of the mortgagor in resorting to appropriate remedies for a cancellation and reconveyance, or for redemption, settling the controversy, quieting his possession, and removing the cloud from his title. The neglect of the mortgagee to institute suit does not subject him to the penalty, which can not be incurred, unless payment of the mortgage debt has been made, and the burden of proving that fact rests upon the mortgagor claiming the penalty. The like proposition is embodied in the third instruction requested by the appellant. There was no error in the refusal of these instructions.

The statute is penal and must be strictly construed.—*Grooms*  
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*v. Hannon, supra.* It is not intended that the penalty shall be paid by a mortgagee, or transferee, or assignee, who, in good faith, having, as he may suppose, real, substantial grounds for a contestation of the fact of satisfaction, refuses to make the entry.—2 Jones' Mort. § 991. Whether the refusal is in good faith, because of room for substantial doubt, the jury must determine, if there be evidence tending to show it. But he can not refuse from mere wantonness, nor can he withhold the entry, that he may compel the mortgagor to submit to an unjust, illegal exaction. The evidence tends to show that intentional usury infected the mortgage debt. If that be true, and the mortgagor had fully paid the principal before making the request that satisfaction be entered—if of that fact there was no real ground of contestation, no reason for substantial doubt, the mortgagee could not withhold the entry, because the nominal amount of the debt was not paid. The real amount secured by the mortgage was the just debt, that which the mortgagor was legally liable to pay. The circuit court, of consequence, erred in the affirmative instruction given the jury; and for the error the judgment must be reversed and the cause remanded.

## Meyer & Co. v. Sulzbacher.

### *Trial of Right of Property.*

1. *Conveyance by husband to wife; title conveyed equitable; claim suit.* A conveyance of personal property by a husband directly to his wife does not pass the legal title, but an equitable title merely, which, though coupled with possession, will not support a statutory claim suit in her name for the property, as against an attaching creditor of the husband.
2. *Same; claim suit for recovery of property thereby conveyed; in whose name instituted.*—In such case, the husband, as trustee for his wife, should interpose the claim; and if he refuses, she can then assert her claim in a court of equity.

APPEAL from City Court of Selma.

Tried before Hon. JON. HARALSON.

On the 2d December, 1882, M. Meyer & Co. sued out an attachment against George Sulzbacher, returnable to the City Court of Selma, which was, on the same day, levied on a stock of goods, wares and merchandise in a store-house in the city of Selma, as the property of the defendant in attachment. The property levied on was then claimed by Mrs. Bertha Sulzbacher, the wife of the said George Sulzbacher, and, on her

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making the statutory affidavit and bond it was delivered to her by the sheriff. The cause was tried by the court, without a jury, on an issue made up under the statute, the trial resulting in a judgment for the claimant.

The claimant claimed the property under a bill of sale executed by her husband, on the 2nd December, 1882, prior to the levy of the attachment, conveying the property directly to her. She was examined as a witness on her own behalf, and testified that when the bill of sale was executed, she took possession of the goods in the store. On cross-examination, however, her testimony on this point is as follows: "I was at the store when I got the bill of sale. Mr. Sulzbacher was there. I did not remain at the store long, about an hour. When I left, I left Mr. Sulzbacher there. I left the goods at the store where they were before. I did not change their position. I left Mr. Sulzbacher in possession. When I left, Mr. Sulzbacher was in charge." She was not at the store when the goods were seized by the sheriff. On behalf of the plaintiffs in attachment, the sheriff was examined, who testified "that the goods, when levied on under the attachment, were in the house on Water street, in the city of Selma, occupied by the defendant, George Sulzbacher, and that Sulzbacher had occupied that store and carried on a general merchandise business there several years." He further testified, on cross-examination, that Sulzbacher, at the time of the levy, "claimed that the goods were his wife's, and not his."

The finding and judgment of the primary court are here assigned as error.

BROOKS & ROY, for appellants.

JOS. F. JOHNSTON, *contra*.

STONE, J.—We can not assent to the argument, that Mrs. Sulzbacher, having taken possession under the bill of sale made by her husband, thereby converted her holding into a legal title, independent of the instrument under which she acquired it. The imperfection of her title, if imperfection it had, lay in the fact that her husband was incapable of vesting a legal title in her.—*McMillan v. Peacock*, 57 Ala. 127. Under the authority of that case, and of *Turner v. Kelley*, 70 Ala. 85, we feel bound to hold that Mrs. Sulzbacher's title was equitable, and would not support a claim in an action at law. Her husband, as her trustee, should have interposed the claim; and, if he had refused, she then could have asserted her claim in the chancery court.—*Block v. Maas*, 65 Ala. 211; *Lehman, Durr & Co. v. Bryan*, 67 Ala. 558.

Reversed and remanded.



[DeGraffenreid v. Clark.]

**DeGraffenried v. Clark.***Ejectment.*

1. *Homestead exemption; by what law governed.*—As against a debt contracted in February, 1873, the extent and value of a homestead exemption must be determined by the Constitution of 1868.

2. *Same; conveyance of.*—Where the area of the homestead is within the limits prescribed by law, a conveyance of it without the voluntary signature and assent of the wife is void; but where the conveyance is of a larger tract, including the homestead, which has not been selected and set apart, the conveyance is valid as to the excess over and above the quantity to which the owner is entitled by way of exemption.

3. *Same.*—In such case, the legal title to the whole passes to the grantee, with the reserved power in the grantor to withdraw the exempted portion from the operation of the conveyance, by some proper act of selection, by which it is separated from the other.

4. *Same; when claimant not injured by verdict.*—Where, in ejectment for one hundred and sixty acres of land, lying in two sections, eighty in each, and both contiguous, the plaintiff claims under a mortgage executed by the defendant, a married man, in February, 1873, without the signature and assent of his wife, to secure a debt then contracted, and the defense is, that, the whole tract being exempt to the defendant as a homestead, the mortgage is void, and the defendant refuses to select a smaller quantity as his homestead exemption, he can not complain of the verdict of the jury allowing him, as exempt, the eighty acres on which are his dwelling and appurtenances, the question having been fairly submitted to the jury as to what particular eighty acres were occupied by him as a homestead.

APPEAL from Greene Circuit Court.

Tried before Hon. S. H. SPROTT.

The facts are sufficiently stated in the opinion.

THOS. SEAY, for appellant.

THOS. R. ROULHAC, *contra*.

SOMERVILLE, J.—The plaintiff in the present action sues in ejectment to recover a tract of land consisting of one hundred and sixty acres. Eighty acres of this tract lie in section seventeen, and eighty in section twenty of the same township and range, the two being contiguous. The dwelling, out-houses and appurtenances, claimed to be occupied by the owner, are situated on the eighty acre parcel in section twenty. The title claimed by the plaintiff is derived from two sources. The first is a mortgage executed by the defendant in February, 1873,

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to secure a debt created by him in the same month and year. The second is a sheriff's deed to the property under an execution sale made in the year 1876.

The plaintiff recovered a verdict only for the eighty acres in section seventeen, thus excluding the other eighty upon which the defendant's dwelling was located.

We need not consider the questions raised by the claim of title under the execution sale. In our opinion the verdict of the jury can be fully justified by the claim of title set up under the mortgage, and by the rulings of the court having reference to this feature of the case, without regard to the other questions which are raised and discussed.

The only homestead exemption to which the defendant was entitled is very clearly that which was allowed by law when the debt of the plaintiff was created, which was in February, 1873, prior, as will be observed, to the act of April 23, 1873, which increased the area of homestead exemptions from eighty to one hundred and sixty acres, when not situated in any city, town or village.—*Nelson v. McCrary*, 60 Ala. 301; *Slaughter v. McBride*, 69 Ala. 512; *Giddens v. Williamson*, 65 Ala. 439.

At that time, February, 1873, the area of such homestead exemptions was that fixed by the Constitution of 1868, which did not exceed eighty acres of land, of a value not exceeding two thousand dollars.—*Hardy v. Sulzbacher*, 62 Ala. 44; *Nelson v. McCrary*, *supra*; Const. 1868, Art. xiv, § 2.

It is insisted that the mortgage, under which plaintiff claims title, is void because it is an attempted alienation of a homestead in the actual occupancy of the owner, and is signed by the husband alone without the signature of the wife, and for this reason it conveyed no estate or interest to the mortgagee. Such is undoubtedly the law where the occupant is entitled to a homestead of a certain area, and attempts to alienate it without the voluntary signature and assent of the wife.—*Halso v. Seawright*, 65 Ala. 431; *Miller v. Marx*, 55 Ala. 322.

But this principle does not hold where the area of the homestead, or its value, exceeds the constitutional or statutory limitation. In such case, the mortgage or conveyance is good for the excess over and above the quantity to which the occupant is entitled by way of exemption. Our decisions are uniform as to this proposition.—*McGuire v. Van Pelt*, 55 Ala. 344; *Garner v. Bond*, 61 Ala. 84; *Snedecor v. Freeman*, 71 Ala. 140.

Where a mortgage or conveyance of this character is made by the husband, without the signature of the wife, it is subject to their claim of homestead exemption, when the right exists by actual occupancy, and has not been lost by abandonment. The homestead to which the defendant was entitled in the

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present case was only eighty acres of the one hundred and sixty included in the mortgage. This he had a right to select, and this power of selection involved the act of designating and distinguishing some particular eighty acres out of the entire tract. Const. 1868, Art. xiv, § 2; *McGuire v. VanPelt*, 55 Ala. 355. The legal title to the whole, however, passed to the grantee, with the reserved power in the grantor to withdraw the exempted portion from the operation of the conveyance by some proper act of selection, by which it is separated from the title of the mortgagee. To accomplish this purpose, a bill in chancery is required in many cases, and is expressly authorized by statute, in certain cases specified in section 2852 of the Code of 1876, in favor of the beneficiary who claims the right. The case of *Slaughter v. McBride*, 69 Ala. 510, is clearly distinguishable from the present case. The homestead there sought to be conveyed by deed was less than eighty acres, and the conveyance was made after the Constitution of 1868 went into effect. The mode of alienation was held to be governed by the Constitution, which was in force at the time the deed was made, although the *quantum* of exemption was regulated by another rule. The deed for this reason was held to convey no legal title to the grantee, the Constitution declaring it to be invalid without the voluntary signature and assent of the wife, which was wanting.

The only selection sought to be made by the defendant was the entire tract or one hundred and sixty acres. This selection was attempted to be made by filing a declaration and claim of exemption under section 2828 of the Code, and by setting up this claim by special plea. The court sustained a motion made by the plaintiff to strike out this plea, as one unauthorized in an action of ejectment, and held that section 2828 had no reference to exemptions claimed against the enforcement of debts contracted between the thirteenth day of July, 1868, when the Constitution of 1868 became operative, and the twenty-third day of April, 1873, when the new exemption law of that date was enacted. The correctness of these rulings we deem to be immaterial, and we need not consider them.—Code, 1876, §§ 2820–21; *Ib.* § 2844; *Clark v. Spencer*, present term [*ante*, p. 49].

Conceding the right of the claimant to make his selection by special plea, he had no right to select more than eighty acres, and this he refused to do. He can not complain that he has been deprived of this privilege, because he has been allowed by the verdict of the jury precisely the quantity to which he was entitled, including the dwelling-house and appurtenances, in the actual occupancy of which he claims to have continued up to the time of commencing this suit. The question was fairly



[Western Union Telegraph Co. v. Judkins.]

submitted to the jury to determine what particular tract of eighty acres was occupied by him as a homestead, including the dwelling and appurtenances, and this they have determined. The only land recovered by the plaintiff was the eighty acres situated in section seventeen, which must be presumed to be the quantity conveyed by the mortgage in excess of the exemption to which the defendant was entitled. If there be any error in the rulings of the court, it is error without injury to the appellant, under the peculiar circumstances of the case.

The judgment is affirmed.

## Western Union Telegraph Company v. Judkins.

*Bill in Equity for Injunction against Telegraph Corporation  
to restrain Continuance of Trespass to Land.*

1. *Trespass to land; when court of equity will not enjoin.*—While a court of equity has jurisdiction to restrain the commission or the continuance of trespasses to lands, it will not intervene when the title is purely legal, and the property is not of peculiar value, unless the remedy at law is inadequate, or there is a necessity for intervention to prevent irreparable injury.

2. *Injunction against corporation exercising power of eminent domain without making compensation; when granted.*—The general rule is, that if a corporation, having the right to take lands in the exercise of the power of eminent domain, enters upon them without making just compensation to the owner, a court of equity will intervene for the protection of the owner, until such compensation is made; but the application must be seasonably made, the right to relief being lost by laches in seeking the protection of the court.

3. *Same; when right to relief lost by laches.*—Where lands on which a telegraph corporation had entered and erected its poles, without having first made just compensation to the owner, were sold, and the purchaser allowed more than two years to elapse after he acquired title before he made any complaint of the wrongful act, the laches of himself and of his predecessor in title exclude him from the aid of a court of equity by injunction.

APPEAL from Montgomery Chancery Court.

Heard before Hon. JOHN A. FOSTER.

The facts are sufficiently stated in the opinion.

THOS. G. JONES and J. M. FALKNER, for appellant.

SMITH & McDONALD and H. STRINGFELLOW, JR., *contra*.  
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[Western Union Telegraph Co. v. Judkins.]

BRICKELL, C. J.—The original and amended bills filed by the appellee, Judkins, state that, individually, and as trustee for several persons who are named, he is possessed of a large tract of land situate in the county of Montgomery, holding under a conveyance executed by one Robert S. Williams. That while the grantor, Williams, had possession of the lands, the defendant, now appellant, a corporation created under the laws of the State of New York, entered upon said lands, without the consent of said Williams, and along the line of the Western Railroad Company, erected poles, and hung wires thereon for the transaction of its business, and has since, without the consent of the complainant, continued the said erection, hindering and preventing the proper and free cultivation of the said lands; and that notice had been given the defendant to remove the said erections, but compliance therewith had been refused. After the filing of the original bill, and after service of the summons, there was a removal of the poles and wires further from the line of the railroad, and, in the removal, there was a trampling down of a crop of cotton growing on said lands. The prayer of the bill is for an injunction restraining the longer continuance of the said erections, and for general relief. A demurrer was interposed to the bill, assigning several distinct causes, all of which may be resolved into the proposition, that a case for equitable interference is not made by the bill. The demurrer was overruled, and from the decree overruling it this appeal is taken.

The injury which forms the gravamen of the bill is a simple, naked trespass; an immediate forcible invasion of the lands of the complainant. A court of equity has jurisdiction to restrain the commission or the continuance of trespasses to lands. But when, as in the present case, the title is purely legal, and the property not of peculiar value, the court will not intervene, unless the remedy at law is inadequate, or there is a necessity for intervention to prevent irreparable injury.—*M. & W. P. R. R. Co. v. Walton*, 14 Ala. 207; *Burnett v. Craig*, 30 Ala. 135; *Brooks v. Diaz*, 35 Ala. 599; *Moses v. Mayor*, 52 Ala. 198; *Boulo v. R. R. Co.*, 55 Ala. 480. "There must be," says Judge Story, "such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which can not be otherwise prevented but by an injunction."—2 Story's Eq. § 925. "The foundation of the jurisdiction," it is said by Mr. High, "rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, and when facts are not shown to bring the case within these conditions, the relief will be refused."

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High on Inj. § 697. In the absence of the imminence of irreparable injury, or of the inadequacy of legal remedies, the court will not interfere to stay the commission of a mere trespass upon lands. If this were not the rule of the court, the result would be, that the jurisdiction at law and in equity would be concurrent, whenever there was a continuous invasion by one man of the lands of another, and a writ of injunction would be a fitting auxiliary of the action of ejectment. There is no authority which authorizes the interference of the court to prevent the mere taking possession of lands and holding them *vi et armis*; nor is there any authority which will justify interference because of the mere continuance of a tortious possession. The entry and possession, however long it may continue, form but one grievance, a single and indivisible cause of action, capable of full redress by legal remedies. *Ballantine v. Town of Harrison*, 37 N. J. Eq. 560 (45 Amer. Rep. 667). If this was the only aspect in which the case was to be considered, there can be no question that the bill is wanting in equity, and the demurrer to it was well taken.

The defendant is a corporation, having the right to take and appropriate lands for the construction of its telegraphic lines. The general rule is, that if a corporation, having the right to take lands in the exercise of the power of eminent domain, enters upon them without making just compensation to the owner, a court of equity will intervene for the protection of the owner until just compensation is made, if he applies seasonably. High on Inj. § 622; *Pierce on Railroads*, 167-68. But the application must be made seasonably; the right to relief is lost by laches in seeking the protection of the court.--High on Inj. § 643. In *Bassett v. Salisbury Manufacturing Company*, 47 N. H. 439, the court said: "Another principle which is held to govern the discretion of the court in these cases, is, that the application for the injunction must be seasonably made; and, therefore, if it appear that the owner of the property supposed to be affected by a nuisance has allowed it to exist for several years, with knowledge of its existence, and without any objection, and especially if he has acquiesced in the claim of another to use and enjoy the subject of complaint as of right, and to expend money upon the strength of it, with his knowledge and without objection, courts of equity will decline to grant an injunction, but leave him to his remedy at law." A party, having full knowledge of his rights, who stands by and without objection permits a corporation, engaged in the construction of a public work, to enter upon his lands, use and occupy them, can not, after the completion of the work, justly and reasonably ask that the operations of the corporation shall be arrested, and the public subjected to inconvenience, by an injunction. If he



[Stoutz, Adm'r, v. Rouse.]

did not assent to the taking of his land, if he claimed just compensation before or at the time of the taking, which is the measure of his right, sheer justice requires that he should make the demand, and, if it is refused, seek the aid of the court before there have been large sums of money expended upon the land, and they have been devoted to uses which can not be disturbed without injury or inconvenience to the public. In such a case, it was said by the Supreme Court of Ohio: "Considerations of public policy, as well as recognized principles of justice between parties, require that we should hold that the property of the owner can not be reclaimed, and that there only remains to him a right of compensation."—*Goodin v. Cincinnati, etc., R. R. Co.*, 18 Ohio St. 169. This is the doctrine of all the courts, and is rigidly applied even by those courts which interfere most liberally for the protection of the owners of lands against the unlawful entry of railroad and similar corporations.—*Binney's case*, 2 Bland's Ch. 99; *M. & E. R. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Easton v. N. Y. & L. B. R. R. Co.* 24 *Ib.* 49; *Traphagen v. Mayor*, 29 N. J. Eq. 206.

When the corporation constructed its lines over the lands now claimed by the complainant, is not shown specifically by the averments. But it is shown that it was during the estate of his predecessor in title, and that more than two years elapsed after the complainant acquired title before he made any complaint of the wrongful taking of the lands. The laches of the complainant and of his predecessor in title exclude him from the aid of the court by injunction.

The decree of the chancellor is reversed, and the cause remanded for further proceedings in conformity to this opinion.

## Stoutz, Adm'r, v. Rouse.

### *Settlement of Decedent's Estate in Probate Court.*

*Correction of clerical error; when § 3154 does not apply.*—If the statute authorizing the correction of certain clerical errors or mistakes within three years after the rendition of final judgment, and inhibiting this court from reversing on appeal, on account of such errors or mistakes, unless the primary court refuses to make the correction (Code, 1876, § 3154), applies to proceedings in the probate court, it has no application, where the error is not shown in the final decree, or in the record proper, but merely in the bill of exceptions, and consists of an improper conclusion drawn from oral testimony; but such error will work a reversal.

APPEAL from Mobile Probate Court.

[Taylor, Adm'r, v. Bush.]

Tried before Hon. P. WILLIAMS, JR.

In the matter of the final settlement of the administration of F. A. Stoutz upon the estate of William Rouse, deceased. The facts are sufficiently indicated in the opinion.

CROOM &amp; LEWIS, for appellant.

R. INGE SMITH, *contra*.

STONE, J.—We do not understand it to be seriously controverted, that in rendering the final decree in this cause, the probate court charged the administrator with twenty-seven dollars more than, on the exceptions and proof, he should have been charged with. It is contended for appellee that this was a mere clerical error, which would have been corrected in the court below, on motion; and will be corrected in this court, at the cost of the appellant. To this it is replied by the appellant, that the statute, prescribing such practice, is confined to clerical errors in the circuit court, and does not apply to errors of like kind, committed in the probate court.—Code of 1876, § 3154. The rulings of this court have not sustained this distinction.—*Ex parte Jones*, 61 Ala. 399; *Dunn v. Tillstson*, 9 Por. 272; *Benford v. Daniels*, 13 Ala. 667; *Moore v. Lesueur*, 33 Ala. 237; 1 Brick. Dig. 80, 82. But we need not decide this question.

The error complained of in this case is not shown in the final decree, nor in the record proper. It is only shown in the bill of exceptions; and even there, it simply consists of an improper conclusion, drawn from oral testimony. We are not aware of any case, in which a final judgment or decree was corrected *nunc pro tunc*, on such evidence; and we are unwilling to establish such a precedent. Nor will we here render a final decree; for, on another trial, the exceptions and testimony may make a different case.

Reversed and remanded.

## Tayloe, Adm'r, v. Bush.

### *Settlement of Decedent's Estate in Probate Court.*

1. *Partial settlement of administration upon decedent's estate; presumption of correctness.*—The presumption of correctness attaching, under the statute, to a partial settlement of an administration upon a decedent's estate, prevails only as to matters of fact, and not to pure questions of law, which are open and subject to contestation upon the final settle-

[*Taylor, Adm'r, v. Bush.*]

ment, the parties in interest not having appeared and litigated either questions of law or of fact.

2. *Partnership; whether created, how determined.*—In determining whether a partnership exists, as between the parties themselves, or in controversies not involving the rights of third parties who have dealt with them as partners, the intention of the parties is the single question for consideration; and when the contract is in writing, the intention must be collected from its words, aided, if there be ambiguity in its terms, by resort to the circumstances under which it was made, the relative situation of the parties, the occasion giving rise to the contract, and the objects and purposes to be accomplished.

3. *Same; test of, and exception thereto.*—While the test of a partnership generally is, whether there is a community of interests, a participation in losses and profits, this test does not apply, when a party, without interest in the capital or business, is merely to be compensated for his services from the profits resulting from a common adventure or enterprise. In such case, the relation of the parties is that of tenants in common in the results of the joint adventure or enterprise, and not that of partners.

4. *Cultivation by administrator of crops planted by intestate; credit for expenditures.*—Where an intestate, at the time of his death, had planted, and was engaged in cultivating crops, it is the duty of the administrator, under the statute, to continue the cultivation of the crops, and to gather and prepare them for market; and for his just and reasonable expenditures in the performance of this duty, he is entitled to credit on settlement (the want of good faith, of prudence, or of diligence, not being imputable to him), although, on account of natural causes, destructive of crops in that section, such expenditures largely exceed the proceeds of the sales of the crops.

5. *Admission of secondary evidence; when error without injury.* Where, on a final settlement of an administration upon a decedent's estate, there is an entire want of evidence to repel the presumption of correctness, in point of fact, of any item embraced in a previous partial settlement, no item embraced in such partial settlement, and protected by such presumption, is re-examinable; and hence, the admission of secondary evidence, in such case, without a proper predicate therefor, of a written contract, in support of an item of credit, allowed on the partial settlement, is error without injury, the evidence being merely redundant and superfluous.

#### APPEAL from Marengo Probate Court.

Tried before HON. JAS. W. TAYLOR.

In the matter of the final settlement of the administration of John W. Bush upon the estate of W. K. Paulling, deceased.

As shown by the record, "W. K. Paulling was living on a large plantation in Marengo county during the early part of the year 1876, and at the time owned a large amount of real and personal property in said county, but had no hands or supplies to run the place with." It was further proved that his real estate was involved in litigation; that such litigation ended adversely to his interests, and that it so ending caused the report of insolvency hereinafter referred to. It was also proved that, in this state of his affairs, said Paulling entered into the following contract with one B. R. Thomas:



[Tayloe, Adm'r, v. Bush.]

“BONNIE CLOVER, MARENGO COUNTY, March 13, 1876.

“The following is a contract by and between Wm. K. Paulling, of the first part, and B. R. Thomas, of the second part, witnesseth: That the party of the first part agrees and binds himself, his heirs and assigns, to divide equally with the party of the second part all the crops and proceeds of his plantation, and lands of every description, as well as the increase of all stock now on said plantation for the year 1876, and for each succeeding year, until the year 1886, including the tenth year. The party of the [first] part further agrees to furnish the party of the second part all the stock, tools and provisions now on hand, free of charge, and the lands free of rent or charge. It is further agreed by the party of the first part, that the party of the second part shall have and hold possession of the dwelling house, appurtenances and other premises on said plantation and lands, and shall have undisturbed possession and control of said premises for the term of ten years. The party of the second part, for himself, his heirs and assigns, agrees to take charge of the plantation and premises, stock, implements and tools of the party of the first part, and manage and conduct the farm in a farmer-like manner, and attend to the business of the party of the first part in a business-like manner, according to the terms of this contract, as a skillful manager; and to keep correct accounts of all expenses incurred in the management of said farm and business, and to make equal division of the net proceeds of said farm annually with the party of the first part. The party of the second part further agrees to treat the party of the first part in a respectful manner, and to minister to his personal comfort and wants in a becoming manner. In witness whereof,” etc.

The said Paulling died on 7th April, 1876. Prior to his death, but after the execution of the foregoing contract, said Thomas “pitched” a crop of corn and cotton on said plantation. The said Bush was appointed administrator on 26th May, 1876. At the time of his appointment, the real and personal property of said decedent was in the possession of said Thomas, who held under said contract, and refused to deliver it up. Said Bush “continued, during the year, 1876, the planting operations which had been begun before the death of said Paulling, and, in and about the same, he expended all the items on the credit side of the account filed by him on 10th December, 1878, for a partial settlement of his administration of said estate. At the time of his appointment, the prospect for a crop on said place was very fine, as it was at the time on all adjoining places; but, in common with those on other places, the crop suffered very heavily from the almost total blight, from which the country suffered so greatly in the summer of

[Taylor, Adm'r, v. Bush.]

that year." As a result of this blight, only nineteen bales of cotton were made on the place, which netted \$749.57, which was all that was realized from the crop of that year on said place. In cultivating the place that year, he expended about \$2000. On 2d March, 1878, he made a partial settlement of his administration, on which he charged himself with the proceeds of said crop, and received credit for amounts paid out by him in cultivating said place. On 8th November, 1880, the estate was declared insolvent, on the report of the administrator; and afterwards W. H. Taylor was appointed administrator of the insolvent estate.

On this settlement, the appellant "moved the court, by his separate motion as to each particular item, to strike from the credit side of the account of said Bush, as such administrator, on his said partial settlement, and now to charge him, in his final settlement, with each and every one of such items and amounts of credit, except those for burial expenses and taxes, paid by said Bush, as such administrator as aforesaid, for and on account of said decedent and his said estate." These motions the court overruled, and the appellant duly excepted.

The witnesses, Noel and Hezekiah, referred to in the opinion, were laborers whom the decedent, by written contract with them, hired on said place during the year of his death; and the administrator, on his partial settlement, obtained credits for amounts paid to them for services rendered under said contract.

The admission of their evidence, and the rulings on the motions above noted are here assigned as error.

W. H. TAYLOR, for appellant.

J. T. JONES, *contra*.

BRICKELL, C. J.—An executor or administrator is not only authorized, but is required to make partial or annual settlements of his administration.—Code of 1876, § 2508. When such settlement is made in the mode prescribed by statute, it is not upon the final settlement conclusive, but every item of account included in it may be re-examined. The statute, however, attaches to it the presumption of correctness, and the "laboring oar" is upon the party impeaching and proposing to re-examine it.—Code of 1876, §§ 2531-32; *Holman v. Sims*, 39 Ala. 709; *Jones v. Jones*, 42 Ala. 218. The errors supposed to lie in the partial settlement made by the appellee as administrator in chief (the settlement having been made in strict conformity to the statute), depend mainly upon the construction of the written agreement made between the intestate

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and Thomas. This is a pure question of law, which may well be regarded as open and subject to contestation upon the final settlement, the presumption of correctness attaching to the partial settlement prevailing only as to matters of fact, the parties in interest not having appeared and litigated either questions of law or of fact.—*Duke v. Duke*, 26 Ala. 673.

After a careful examination of the agreement, though it is very inartificially drawn, and there is a want of precision and accuracy in its expression of the relations and rights of the parties, we are of opinion that it was not their intention to create a partnership, but rather a tenancy in common of the products of cultivation of the plantation of the intestate, of which Thomas was entitled to possession and control, and, for his services and skill in its management, was entitled to one half of the net profits. In determining whether a partnership was created, the intention of the parties is the single question for consideration. There is a well recognized distinction between cases where third persons have dealt with parties associated in business as partners, and controversies between the parties themselves, or controversies in which the rights of such persons are not involved. In the one class of cases, a partnership may arise by mere operation of law, without an inquiry into, or in direct opposition to the expressed intention of the parties. In the other class of cases, the question is as to the intention of the parties, and when the agreement or contract is in writing, the intention must be collected from its words; and if there is ambiguity in its terms, to aid in its construction, resort must be had to the circumstances under which it was made, the relative situation of the parties, the occasion giving rise to the contract, and the objects and purposes to be accomplished. *Emanuel v. Draughn*, 14 Ala. 303; *Couch v. Woodruff*, 63 Ala. 466; *Autrey v. Frieze*, 59 Ala. 587. The test of a partnership generally, whether the controversy is between the parties, or *quoad* third persons, is, whether there is a community of interests, a participation in losses and profits.—*Honze v. Patterson*, 53 Ala. 205; *Autrey v. Frieze*, *supra*. The rule is not without its exceptions; and when a party is without interest in the capital or business, and is to be compensated for his services from the profits, or rewarded by the profits, or what is to depend upon the result of a common adventure or enterprise, the rule is without application.—*Richardson v. Hughitt*, 76 N. Y. 55 (32 Am. Rep.) 267; *Emanuel v. Draughn*, *supra*; *Couch v. Woodruff*, *supra*. This contract is within the exception; the participation of Thomas in the profits was simply intended as compensation to him for his skill and services as the manager of the stock and plantation, and in the cultivation and gathering of the crops.



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The parties standing in this relation, crops having been planted and in the course of cultivation at the death of the intestate, it was the duty of Bush, as administrator in chief, prescribed and imposed by the statute, to continue the cultivation, to gather and prepare them for market, and to make sale of them.—Code of 1876, §§ 2439–41; *Loeb v. Richardson*, 74 Ala. 311. The law casting upon him this duty, the just and reasonable expenditures, to which he was compelled in the performance of the duty, must, of consequence, be reimbursed to him from the estate in his hands for administration. True, these expenditures seem to have exceeded largely the proceeds of the sales of the crops. But there was no want of good faith, or of prudence, or of diligence imputable to him. The unfortunate and unprofitable result was attributable to natural causes, destructive of other crops in the same section, against which, however, foresight and judgment could not guard. A personal representative, keeping within the line of duty and authority, exercising reasonable care and diligence, is not an insurer of events or of results; he is a guarantor only of his own fidelity. *Gould v. Hays*, 19 Ala. 438.

There was an entire want of evidence to repel the presumption of correctness, in point of fact, of any item embraced in the partial settlement, and in that event it was not re-examinable. It stood protected and unimpeached by the presumption which the statute attaches to it. The items for payments made to or for the witnesses Noel and Hezekiah were within the presumption. It must be conceded that their evidence as to the contract in writing between them and the intestate was secondary, and inadmissible to support the credits, if there had been evidence authorizing a re-examination of them. But as the case is presented by the bill of exceptions, the evidence was merely redundant and superfluous; without it, the probate court was bound to the allowance of the credits, or rather to suffer the partial settlement to stand as correct. The admission of evidence, which is merely redundant and superfluous, is not an error available to reverse a judgment; for the plain reason that it is incapable of working injury.—*Fant v. Cathcart*, 8 Ala. 725; *Bishop v. Blair*, 36 Ala. 85; *Jemison v. Dearing*, 41 Ala. 283. There is no error in the record prejudicial to the appellant, and the decree of the court of probate must be affirmed.

[Murphy v. Hunt, Miller &amp; Co.]

**Murphy v. Hunt, Miller & Co.***Contest of Homestead Exemption.*

1. *Right of homestead exemption ; how determined.*—The right to a homestead exemption must be determined by the facts existing at the time the lien under process attaches ; and hence, if the debtor be a non-resident of the State at the time the lien attaches, his subsequent removal to the State does not entitle him to a homestead exemption as against such lien.

2. *Change of domicil ; what constitutes.*—A change of domicil can be accomplished only by a completed act, done with the intention of consummating a removal from the original domicil *animo manendi* ; and what state of facts constitutes such change, is a mixed question of law and fact.

3. *Same ; when a question for the court, and when for the jury.*—In cases free from doubt, the court may charge the jury that a change of domicil may be inferred, as matter of law, from a given state of undisputed facts ; but when the facts are disputed, or the inferences to be drawn from them are at all doubtful, the question of intention should generally be submitted to the jury as one of fact.

4. *Right of homestead exemption ; when lost.*—A debtor loses his right of exemption of his homestead from levy and sale under process, by leaving and quitting the premises, and placing a tenant in possession, without having filed his written declaration and claim for record in the office of the judge of probate, in accordance with the requirements of section 2843 of the Code of 1876.

5. *Same.*—The mere lodging of his claim, in such case, with the sheriff after the levy of process, under the provisions of section 2834 of the Code of 1876, will not entitle him to an exemption of the premises from levy and sale under the process.

**APPEAL from Chambers Circuit Court.****Tried before Hon. JAMES E. COBB.**

Hurst, Murphy & Co., the appellees, having, at the spring term, 1883, of said court, recovered a judgment against the appellant, J. H. Murphy, caused an execution issuing thereon to be levied on a designated lot in the town of LaFayette. After the levy the appellant lodged with the sheriff a claim to the lot as exempt to him as a homestead, in pursuance of section 2834 of the Code of 1876. This claim was contested by the appellees ; and the contest was tried on an issue "made up and joined under the direction of the court," the trial resulting in a verdict in favor of the appellees, and a condemnation of the lot to sale for the satisfaction of the judgment.

The facts disclosed by the record, necessary to an understanding of the points decided, are sufficiently stated in the opinion.

[Murphy v. Hunt, Miller &amp; Co.]

W. H. BARNES, for appellant.

E. G. RICHARDS, *contra*.

SOMERVILLE, J.—The right to a homestead or other exemption, which is conferred by the Constitution and the statute laws of this State, must be determined according to the state of facts existing at the time when the lien of execution or other process against the claimant attaches. If the right does not exist at this particular time, it can not be created by any subsequent act of the execution debtor. If, therefore, the claimant was a non-resident of the State at the time of the levy of the appellees' writ of attachment, it is manifest that his subsequent removal back to the State from Texas, could not operate to divest such lien.—*McCrary v. Chase & Co.*, 71 Ala. 540. A different doctrine, it is true, was asserted in *Watson v. Simpson*, 5 Ala. 233, but that case must be considered as overruled by *McCrary v. Chase & Co.*, *supra*.

It is the plain intent of our constitutional and statutory provisions, that the right to a homestead exemption is intended only for the benefit of residents of the State and their families, and can not be invoked by non-residents.—*Talmadge v. Talmadge*, 66 Ala. 199; Constitution, 1875, Art. x, § 2; Code, 1876, § 2820.

What state of facts shall be deemed to constitute a change of domicile may be considered a mixed question of law and fact, and is one proverbially difficult to determine, owing to the doubtful interpretations of human conduct. It is universally admitted that such a change is never effected by intention alone. It can be accomplished only by a completed act, done with the purpose of consummating a permanent removal from the original domicile, *animo manendi*. The old domicile continues until a new one is acquired *facto et animo*.—*State v. Hallett*, 8 Ala. 159; *Glover v. Glover*, 18 Ala. 367; Story's Conf. Laws, § 47; *Talmadge v. Talmadge*, *supra*. A change of domicile can not be inferred from an absence which is shown to be temporary, and attended with the requisite *animus revertendi*.—*McConnaughy v. Baxter*, 55 Ala. 379; *Kelly v. Garrett*, 67 Ala. 304. The intention to return is usually the controlling element in the determination of the whole question. *Lehman v. Bryan*, 67 Ala. 558.

In cases free from doubt, it is obvious that the court may charge the jury that a change of domicile may be inferred, as matter of law, from a given state of undisputed facts. But where the facts are disputed, or the inferences to be drawn from them are at all doubtful, the question of intention should generally be submitted to the jury as one of fact.



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The evidence in the present case was, perhaps, sufficiently conflicting as to the *animus revertendi* on defendant's part, to have authorized the submission of the question to the jury, had the issue in dispute not turned on another point, which is made conclusive by the statute, and which we now proceed to consider.

The defendant's right of homestead exemption was lost, in our judgment, by his leasing and quitting the premises, and placing his tenant in possession, without having filed his written declaration and claim of exemption for record in the office of the probate judge, in accordance with the requirement of section 2843 of the Code.

Before the enactment of the statute now partially embraced in this section of the Code, it was held by the court, in *Kaster v. McWilliams*, 41 Ala. 302, that the actual occupancy and use of the homestead by the owner or his family were necessary to entitle him to its exemption from levy and sale, and that this right was lost when he abandoned its occupancy and rented it out, to be occupied by a tenant. The principle declared in that case has been since repeatedly affirmed.—*Stow v. Lillie*, 63 Ala. 257; *Boyle v. Shulman*, 5 Ala. 566. Our present Constitution and statutes recognize this ruling, by providing for the exemption only of such a homestead as may "be owned and occupied" by residents of this State, and such exemption is declared to continue only during "occupancy."—Const. 1875, Art. x, § 2; Code 1876, § 2820; *Martin v. Lile*, 63 Ala. 406; *Preiss v. Campbell*, 59 Ala. 635.

It is declared, however, by section 2843 of the Code that "a temporary quitting or leasing" of a homestead for a period of not more than twelve months at any one time, "shall not be deemed to be an abandonment" of the right of homestead exemption where it otherwise existed. But this temporary leasing is not only limited in point of time, but is permitted only on a certain specified condition. The owner must "make and file a declaration and claim" especially provided for by the statute. It is only by conforming to this statutory condition that the right of exemption remains unimpaired, and the leased premises are permitted to "remain subject to the same right of homestead" as if the claimant "had continued in the actual occupancy thereof."—Code, § 2843.

It is insisted by appellant's counsel that this section has reference as well to a claim of exemption lodged with the sheriff under the provisions of section 2834, as to a filing for record in the office of the probate judge, in accordance with the requirements of section 2828 of the Code. We are of opinion that this construction is unsound, and that the declaration and claim of homestead here referred to is the one described

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in section 2828, which is required to be in writing, describing the property selected and claimed as exempt, and to be verified by oath and "filed for record in the office of the probate court of the county in which the property is situated."—Code, § 2828; *Boyle v. Shulman*, 59 Ala. 566. The words used are, "if he shall make and file the *declaration and claim* as herein provided."—Code, § 2843. This is the precise description of the declaration in writing required by section 2828 to be filed for record with the probate judge. It is elsewhere characterized as "such declaration and claim" without any doubt as to the subject of reference.—Code, § 2830. The claim authorized to be made after a levy is perfected under sections 2832 and 2833 is designated as a "claim in writing under oath," and the language used is, that it shall "be *lodged* with the officer making the levy."—§ 2834. The identity of phraseology used, as well as the reason of the law, shows that "the declaration and claim" alluded to in section 2843 is the one described in section 2828, and not the claim required to be lodged with the sheriff for the purpose of inaugurating a contest with the levying creditor under section 2834. The latter is a mere *claim*. The former is something more. It is a *declaration* as well as a *claim*. It imports the idea of public notification, or publicity. When made and recorded, its effect is to "operate as *notice*" of its own contents to all creditors and others interested.—Code, § 2828. And as against the creditors of the claimant it is declared to be "*prima facie* evidence of the correctness of such claim," and may be "repeated from time to time as occasion may require."—Code, § 2831.

Where the debtor has abandoned the actual occupancy of his homestead, and lets it to a tenant, there is good reason for requiring a recorded declaration to be made explanatory of his intention. Such quitting and leasing, without explanation, is *prima facie* an abandonment. But this presumption may be rebutted by a *contemporaneous* claim of exemption, making public the *animus revertendi* on the part of the debtor. Such a declaration thus becomes a part of the *res gestæ* of the leasing itself, putting creditors upon warning as to the claimant's published purpose to return. The lodging of a claim with the sheriff after making a levy would be in the nature of a declaration made *post litem motam*, or one advantageous to the declarant after the rights of creditors have intervened, and would be entitled to little weight, as evidence in explanation of antecedent intention.—Thomp. Homesteads, § 270.

We are of opinion that the failure of the appellant to file his claim of exemption in the office of the probate judge operated, under the facts of this case, as a forfeiture of his right to

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homestead exemption. The court, in effect, so charged the jury, and its judgment is affirmed.

## Martin, Dumee & Co. v. Brown, Shipley & Co.

*Action on Foreign Bill of Exchange, by Indorsee against Drawer and Payee.*

1. *Recoupment of damages ; statutory provisions.*—The act approved January 25th, 1879, entitled “An act to provide the mode of procedure in cases in which the claim of recoupment of damages is interposed” (Pamph. Acts 1878–9, p. 154), does not add to or enlarge the class or number of claims or demands which may be the subject of recoupment, but only authorizes a judgment for the defendant for any excess of damages over and above the plaintiff’s claim, as under the plea of set-off.

2. *Same ; what demands may be recouped.*—In an action *ex contractu*, the defendant can not claim a recoupment of damages on account of defamatory words, written or spoken, published of him by the plaintiff, though they may relate to the contract sued on, its subject-matter, or breach.

3. *Protest of bill of exchange ; contents and sufficiency of notary’s certificate.*—A statement in the notary’s certificate of protest, of the names of the parties to whom notice of protest was sent by him, is made by statute competent evidence of the facts stated (Code, § 1336) ; but such statement is not an essential part of the protest, and the fact of notice may be proved otherwise.

4. *Secondary evidence of writings beyond jurisdiction of court.*—When original letters or documents are in a foreign country, beyond the jurisdiction of the court, secondary evidence of their contents is admissible, although the witness has the original in his possession.

5. *Proof of agency ; acts and declarations of agent.*—The general rule is, that the fact of agency must be proved, before the acts, declarations or admissions of the agent can be received as evidence against the principal ; but, where the fact of the agency rests in parol, or is to be inferred from the conduct of the principal, if there is any evidence tending to show the agency, the acts or declarations of the agent are admissible as evidence, and the jury must determine the question of agency *vel non*.

6. *Relevancy of evidence as to price and quality of cotton shipped to Liverpool, in action between parties to bill of exchange drawn against shipment, and protested for non-acceptance.*—In an action by the indorsee and purchaser, against the drawer and payee of a foreign bill of exchange, which was drawn against a consignment of cotton shipped from Mobile to Liverpool, and was protested for non-acceptance, evidence as to the quality of the cotton is irrelevant and inadmissible, in the absence of evidence showing that it was sold by plaintiffs in Liverpool as of a quality inferior to that at which it was purchased in Mobile ; and if the plaintiffs can be held liable, in such action, for any loss resulting to defendant from their unreasonable delay in selling the cotton in Liverpool after the protest of the bill for non-acceptance, some evidence of such delay and consequent loss must be adduced, before evidence as to the market price



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of cotton in Liverpool when the cotton arrived there is relevant and admissible.

7. *Notice of dishonor of bill.*—Notice of the dishonor of a bill of exchange, foreign or domestic, though generally given in writing, may be given verbally.

8. *Abstract charge.*—A charge requested, which is based, in whole or in part, on a state of facts, of which there does not appear to have been any evidence whatever, is abstract, and is properly refused for that reason.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Brown, Shipley & Co., partners doing business in Liverpool, England, against Martin, Dumee & Co., a partnership engaged in the business of buying and selling cotton in Mobile, Alabama; and was founded on a foreign bill of exchange for £6,729, 15s., 9d., which was drawn by the defendants, dated Mobile, October 2, 1880, payable sixty days after sight, to their own order, in London, and addressed to W. D. Coddington & Sons, Blackburn, England, who were therein directed to "charge the same to account of 502 bales of cotton *per steamer Juana*." The bill of exchange was drawn against the shipment of cotton, which was bought by defendants on account of Coddington & Co., on an order received by telegram from one Vernon, defendants' agent at Blackburn, England; and the bill of exchange was sold and negotiated to plaintiffs, through one W. F. Halsey, their agent at New Orleans, the bills of lading being attached as collateral security, and a letter sent by defendants to plaintiffs at the same time, in these words:

"NEW ORLEANS, Octo. 2d, 1880.

"Messrs. Brown, Shipley & Co. (Liverpool): We have this day sold to W. F. Halsey our bill on Messrs. W. D. Coddington & Sons, dated this day, for £6,729, 15s., 9d., sterling, against a shipment of 502 bales of cotton *per steamer Juana*, for Liverpool, as *per* bill of lading to order herewith; with the understanding, that the bills of lading are lodged as collateral security for the acceptance, and, if in your discretion you deem it advisable, for the payment of said bill, with liberty to surrender the bills of lading against a broker's engagement; and you are authorized, in case you think necessary, to place the said 502 bales of cotton at any time in the hands of your brokers for sale at your discretion, and to charge all expenses, including commissions for sale and guarantee, and to apply the proceeds in or towards payment of the bill, for account of 'whom it may concern'." (Signed by said defendants.)

The bill was presented by plaintiffs, on the 22d October, to said Coddington & Sons for acceptance; but they refused to accept it, on the ground that the bill was drawn at the rate of

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7*d.* per pound for the cotton, while they had only agreed to pay 6*d.*; and the bill was thereupon protested for non-acceptance. The cotton did not arrive in Liverpool until the 8th November, and was then placed in a warehouse by plaintiffs; and having been sampled by their brokers, it was sold in lots, according to classification, on the 18th, 20th, 23d and 25th November, the net proceeds of sale amounting to £5,829, 8*s.*, 7*d.*, which was applied by plaintiffs on the bill of exchange.

The pleadings in the case cover thirty pages of the transcript, but the points decided by this court render it unnecessary to state them at length. The complaint contained several counts on the bill of exchange, and the common money counts. The defendants pleaded the general issue to the common counts, and several special pleas to the counts on the bill. Several of the special pleas sought to recoup damages alleged to have been sustained by defendants by reason of certain telegrams sent by plaintiffs, by cable, to different persons in New Orleans, the substance of which was, that defendants had drawn on Codrington & Sons for more than they were authorized to draw; and the pleas alleged that these telegrams were libelous and slanderous, were maliciously published by plaintiffs of and concerning the defendants in their business as cotton merchants, and had greatly injured them in their said business; and offered to set off these damages against the demand claimed by plaintiffs in their complaint. The court sustained demurrers to each of these special pleas. The defendants pleaded, also, that they had not been duly notified of the dishonor of the bill, and that they had sustained damages, which they offered to set off, by the plaintiffs' negligence and delay in selling the cotton; and these were the principal issues finally submitted to the jury.

On the trial, as appears from the bill of exceptions, the plaintiffs gave in evidence the bill of exchange, and also the notary's certificate of protest, which was in the usual form, and which was offered "to prove that said bill had been protested." The defendants objected to the admission of the certificate as evidence, "because the same does not show that notice of said protest was sent to these defendants"; and they duly excepted to the overruling of their objection. The plaintiffs afterwards proved by one Hoffman, "who was the confidential clerk of said W. T. Halsey, plaintiffs' agent in New Orleans," that on the 26th October, 1880, he received a telegram from Brown Brothers & Co., plaintiffs' New York firm, stating that defendants' said draft had been protested for non-acceptance; and that on the next day, October 27th, "for said Halsey, and also representing plaintiffs, he gave verbal notice to E. S. Dumeé, one of defendants said firm, that said bill of exchange on Codrington & Sons had been protested for non-acceptance the day

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before, and that the holders looked to said defendants for payment." The defendants objected to this testimony, "so far as tending to show verbal notice to said Dumee of dishonor and protest, and moved to exclude the same, because verbal notice was insufficient;" and they duly excepted to the overruling of their objection and motion.

The plaintiffs read in evidence the deposition of said W. D. Coddington, taken in Blackburn, England, who testified as to his purchase of the cotton from Vernon, as defendants' agent, the terms of the sale, and the reason for the refusal of his firm to accept the draft; and among other things deposed thus: "In September, 1880, I arranged with Mr. F. W. B. Vernon to purchase from the firm of Martin, Dumee & Co., of Mobile, for whom he represented to me that he was authorized to act as agent, five hundred bales of cotton, low-middling Orleans, good staple, equal to sample which he then produced to me, and which, when we agreed upon terms, was sealed up and handed over to my firm. I produce the original 'sale-note,' signed by said Vernon, and attach a copy of it to this deposition, marked and initialed by me for identification; but I decline to part with the original, as I may hereafter require it." The "sale-note," as shown by the copy here set out, was dated at Blackburn, September 28, 1880, signed by said Vernon, with the word "agent" added to his name, and addressed to said W. D. Coddington & Sons, and was in these words: "I have received a cable message from Messrs. Martin, Dumee & Co., saying that they accept your offer of 6*d.* per pound for 500 bales of low-middling, canebrake cotton, as per sample, cost, freight, insurance, and six per cent. loss in weight, for prompt shipment per steamer from New Orleans; of which the advice will be given," etc. "The defendants objected to the introduction of said copy as evidence, because the witness admitted possession of the original, which was the best evidence, and should have been produced; and also because it had not been shown that Vernon was defendants' agent to write said letter, and the original message from them to said Vernon, received by him, is the only evidence admissible against them." The court overruled each of these objections, and admitted the evidence, and exceptions were duly reserved by the defendants. The bill of exceptions recites, in this connection, that there "was other evidence, also, tending to show said Vernon's agency for defendants, as appears herein;" and it further shows several other exceptions reserved by defendants, on the same ground, to other letters mentioned by said witness, copies of which were annexed to his deposition, though he had the originals in his possession.

The defendants propounded to several of the plaintiffs' witnesses, whose depositions were taken in Liverpool, this cross-



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interrogatory: "Was the market for cotton rising or falling at the time Coddington & Sons refused to accept said bill." Each of the witnesses answered: "It was falling." This evidence was excluded by the court, on objections by plaintiffs to both question and answer; and the defendants excepted. The defendants introduced as a witness one W. H. Martin, a member of their firm, "and offered to prove by him the 'Liverpool General Brokers' Association Prices-Current,' for cotton, on Friday, October 22d, 1880, showing that low-middling Orleans was quoted on that day at 6 11-16*d.*, middling Orleans at 7 1-16*d.*, and good-middling at 7 3-8*d.*" The court excluded this evidence, on plaintiffs' objection, "as irrelevant and immaterial;" and the defendants excepted. The defendants also offered to prove, by the same witness, "the price in Liverpool, on 22d October, 1880, of the grades of cotton shipped by the steamer *Juana*;" also, "whether the cotton in question was worth, on the 22d October, 1880, more or less than the face of the bill, and how much;" and "that the value of the cotton, on that day, exceeded the amount of the draft £124, 8*s.*, 2*d.*" Each portion of this evidence, as offered, was excluded by the court, as being irrelevant and immaterial; and exceptions were duly reserved by the defendants to these several rulings.

The sustaining of the demurrers to the defendants' special pleas of recoupment, with other rulings on the pleadings adverse to them, the several rulings on evidence to which exceptions were reserved, as above stated, and the refusal of several charges asked by the defendants (which the opinion of this court renders it unnecessary to set out), are now assigned as error.

F. G. BROMBERG, for appellants.

P. & T. HAMILTON, *contra*.

BRICKELL, C. J.—We can not concur in the argument of the counsel for the appellants, that the act of the General Assembly, approved January 25th, 1879, entitled "An act to provide the mode of procedure in cases in which the claim of recoupment of damages is interposed." (Pamphlet Acts, 1878-79, p. 154), adds to or enlarges the character of claims or demands which form proper matter of recoupment. Certainly, the act does not admit of a construction which will authorize the defendant, in an action *ex contractu*, to interpose a claim for damages, because of a libel published, or of slander spoken by the plaintiff concerning him, though the libel or slander may relate to the contract, or to its subject-

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matter, or breach. A statute which would work a change so radical in settled laws, introduce into a suit such a multiplicity and diversity of issues, perplexing and confusing to juries, ought to be clearly and unambiguously expressed. When the act is compared, as it must be, with the prior state of the law, the only change it introduces is, that if the damages the defendant has the right to recoup, are found to exceed the amount of the plaintiff's demand, he shall be entitled to a judgment for the excess; assimilating the procedure upon a plea of recoupment to that which has long prevailed by statute on the kindred plea of set-off.—*Hatchett v. Gibson*, 13 Ala. 587; *Batterman v. Pierce*, 3 Hill (N. Y.), 171. The pleas of recoupment were of matters wholly foreign, and incapable of being introduced into the suit. The circuit court, *ex mero motu*, could have properly ordered them stricken from the file.—*Johnson v. McLaughlin*, 9 Ala. 551.

A notarial protest of a bill of exchange for non-acceptance, or for non-payment, usually states the name and place of residence of the notary; that he was duly qualified; the time, manner, and place that he made demand of the acceptance, or of the payment of the bill; describing or identifying, usually by reference to a copy written upon the reverse of the certificate, the names of the parties of whom the demand was made, the refusal, and the name of the party at whose request acceptance or payment was demanded. It is not unusual now to embody in the protest a statement of the parties notified, or to embody such statement in a separate certificate. But it is only by statute the statement is evidence of the fact of notice. At common law, it was not accepted as evidence of that fact; "and it is not an essential part of the protest, for notice may be proved otherwise, though the statute makes the certificate of the notary competent evidence of it."—*Rives v. Parmley*, 18 Ala. 256. There was no error in the admission of the notarial protest.

The originals of the several letters, copies of which were produced and proved, were in a foreign country, without the jurisdiction of the court; and secondary evidence of their contents, though it had been verbal, was admissible.—1 Whart. Ev. § 130.

The general rule is, that the fact of agency must be shown before the acts, or the declarations, or admissions of the agent will be received as evidence against the principal. But, if the fact of agency rests in parol, or is to be inferred from the conduct of the principal, and there be evidence tending to show the agency, the acts or declarations of the agent are admissible in evidence, and the jury must determine the fact of agency *vel non*.—*Gimon v. Terrell*, 38 Ala. 208; *McClung v. Spots-*

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*wood*, 19 Ala. 165; *Bank of Montgomery v. Plannett*, 37 Ala. 222. The bill of exceptions expressly recites, that there was evidence tending to show that Vernon was the agent of the appellants.

The evidence in reference to the state of the cotton market in Liverpool, when the cotton arrived there, or as to the quality of the cotton, or its value in Mobile at the time of its purchase, seems to us wholly irrelevant. It may be conceded that the appellees were bound to the exercise of reasonable diligence in making sales of the cotton, after its arrival in Liverpool, and there was a refusal by the drawees to accept the bill; and if there had been unreasonable delay or negligence, that they would have been liable for any loss resulting to the appellants. But there was a want of evidence tending to show such delay or negligence, and in its absence all inquiry as to the state of the market was irrelevant; as was all evidence as to the quality of the cotton, unless there had been evidence that it was sold by the plaintiffs as of a different or inferior quality. While the court should with care guard against the exclusion of evidence, however slight or weak it may seem, which has a tendency to establish any material fact, it should with equal care guard against the introduction of evidence which is irrelevant—which does not directly tend to the proof or disproof of a material fact.—*State v. Wisdom*, 8 Port. 511; *Governor v. Campbell*, 17 Ala. 566.

Notice of the dishonor of a bill of exchange, foreign or domestic, may be given in writing, or may be given verbally. The form of notice is not material; all that is necessary is, that within a reasonable time after dishonor, the party liable and intended to be charged should be apprised of the dishonor, and that he is looked to for payment.—Byles on Bills, 412. True, as is often said in the books, it is more prudent to give the notice in writing, because thereby the evidence of it will be the better preserved, in the event the fact becomes matter of dispute. But this is far from saying that notice in writing is indispensable.—Wade on Law of Notice, § 831. There was no error in the admission of evidence that verbal notice of the dishonor of the bill was given to the defendants.

The rule of practice has long been settled, that a charge requested, though it may state a correct legal proposition, is properly refused, if it is based, in part, or in the whole, upon a state of facts of which there does not appear to have been evidence. Such a charge is abstract. It is not necessary to consider separately the several instructions requested by the appellants. Such as could in any event be regarded as stating correct legal propositions, are obnoxious to this objection.

We find no error in the record, and the judgment must be affirmed.



[Smith v. Louisville and Nashville Railroad Company.]

## Smith v. Louisville and Nashville Railroad Company.

*Action by Father against Railroad Company for Killing Minor Child.*

1. *Damages against corporation for killing minor child; section 2899 of the Code construed.*—Section 2899 of the Code of 1876, providing that “when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation, or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess,” creates a new cause of action, is highly penal in its terms, and must be construed as a penal statute.

2. *Same; section 2899 unconstitutional.*—Said section of the Code (2899) is violative of section 12 of article 14 of the State Constitution, providing that “all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons,” and is void.

3. *Constitutional law; article 14, section 12, construed.*—This provision of the Constitution must mean that where the cases are alike, the cause of action the same description of contract or tort, there must be no discrimination between corporations and natural persons, in the matter of prosecuting or defending suits.

APPEAL from City Court of Montgomery.

Tried before Hon. T. M. ARRINGTON.

The facts are sufficiently stated in the opinion.

R. M. WILLIAMSON and GEO. W. TOWNSEND, for appellant, contended, *inter alia*, and argued at length, in reply to argument of counsel for the appellee, that the statute under consideration was constitutional, citing, *arguendo*, the following authorities: Code of 1852 §§ 1938–41; Acts 1871–2, p. 83; *Ib.* p. 82; *Dorman v. State*, 34 Ala. 216; Cooley on Con. Lim. 390; Art. 14, Sec. 12, Con. 1875; *Paul v. Virginia*, 8 Wall. 168; Code, 1876, § 2643; *Zeigler v. S. & N. R. R. Co.*, 58 Ala. 594; *S. & N. R. R. Co. v. Morris*, 65 Ala. 193.

THOS. G. JONES and J. M. FALKNER, *contra*, after an elaborate discussion of other questions raised by the record, but not passed on by the court, contended that said statute was violative of section 12, article 14, of the Constitution of 1875, and cited, *arguendo*, the following authorities: *Holden v. James*, 11 Mass.

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396; *S. & N. R. R. Co. v. Morris*, 65 Ala. 200; *Wally v. Kennedy*, 2 Yerger, 554; *Waddell v. Vanzant*, *Ib.* 260; Cooley on Con. Lim. §§ 391-3; 28 Wis. 464; 12 Bush (Ky.), 110.

STONE, J.—This is a suit by appellant, the father, against the appellee, corporation, under section 2899 of the Code of 1876, to recover damages for the alleged killing of the minor child of the former, through the wrongful act and omission of the defendant's agent. The section of the Code reads as follows:

“When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess.”

This statute creates an entirely new cause of action—one theretofore unknown. Before its enactment—Feb. 24, 1872—neither the father nor mother could recover damages for such killing. Not only does the statute create a new cause of action, but it confines the right to maintain such suit to the father, if living, and if not, to the mother. If neither be living, no one else can maintain the suit. And the statute is highly penal in its terms, and must be construed as a penal statute.

Is the act copied above constitutional? It will be observed that under the statute, the action lies only against certain classes; corporations, and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers or agents, may cause the death of a minor child by the wrongful act or omission of such officer or agent, and there will be no liability for such death. To illustrate: Manufacturing establishments in all their extensive variety, mining enterprises, cotton compresses, mills, steam vessels, and even railroads, may be owned and operated without incorporation, and by a single proprietor. These are not within the law; and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or, if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of business, and the wrongful act or omission of the agent be, in each case, the same. How this will work, will readily suggest itself. If the employer, being a single individual,

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be not responsible for the wrongful act or omission of the agent he employs, how can the same act by the same agent, employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more owned the business, and united in employing the agent? If so, on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital?

Within the last twenty years very important constitutional provisions, Federal and State, have been adopted. Article 14 of the Amendments to the Constitution of the United States declares, section 1, that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Speaking of this provision, Justice Field, of the U. S. Supreme Court, in *County of San Mateo v. So. Pa. R. R.*, said: "It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges, than such as are equally imposed upon all others under like circumstances."—8 Am. & Eng. R. R. Cases, 1-11 (8 Sawyer, 238). And Circuit Justice Sawyer, in the same case, p. 33, said: "In my judgment, the word 'person' [in this clause of the 14th amendment] includes a private corporation." See note to that case on page 56. This question, however, would seem to be settled by our own State Constitution, article 14, section 12, which ordains that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons." "In like cases as natural persons," must mean that where the cases are alike, the cause of action the same description of contract or tort, there must be no discrimination between corporations and natural persons, in the matter of prosecuting or defending suits. A tort which will support an action for one, will support it for the other, and a defense available to one, is available to the other.—*Mayor v. Stonewall Ins. Co.*, 53 Ala. 570; *Green v. The State*, 73 Ala. 26. The sum of these provisions is, that no burden can be imposed on one class of persons, natural or artificial, which is not, in like conditions, imposed on all other classes. And so we held in *S. & N. R. R. Co. v. Morris*, 65 Ala. 193, re-affirmed in *Home Protection Ins. Co. v. Richards*, 74 Ala. 466. See, also, *Strauder v. West, Virginia*, 100 U. S. 303. In *Richards' case, supra*, we sanctioned a different rule as to venue—the mere form of proceeding—when a corporation is sued. We reached this conclusion by force of the corporation's mode of conducting its business; that its scene of active operations is ambulatory, and its domicil, if domicil it has, is essentially unlike, as its business transactions



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are unlike, those of a living, human being. The difference commented on in that case did not affect the nature or measure of liability, but only the forum, or form of its enforcement. If the effect of the statute, therein construed and held constitutional, had been to fasten a liability on one class, from which the other class was exempt, the case would have been considered as falling properly within the influence of *Mayor v. Stonewall Insurance Co.*, and *S. & N. R. R. Co. v. Morris*, *supra*.

In the very well considered case of *Chicago, St. Louis & N. O. R. R. Co. v. Moss*, 60 Miss. 641, our decision in *S. & N. R. R. v. Morris* is commented on, approved and followed. See, also, *Gordon v. W. Building & A. Fund Asso.*, 12 Bush (Ky.), 110; *Durker v. Janesville*, 28 Wisc. 464.

We regret the duty, so often cast upon us, of construing statutes which discriminate between persons, natural and artificial, sometimes in favor of the one, and sometimes in favor of the other; but we have no discretion. We feel constrained to hold the section of the Code, under which this action was brought, to be unconstitutional.

The present case was tried in the court below on issues which did not directly raise the question we have been considering. It is manifest, however, that the action was brought under section 2899 of the Code, and that without that statute, it can not be maintained. That statute being pronounced unconstitutional, it is equally manifest that the plaintiff in the present suit never can recover. We will not scrutinize the various rulings of the city court, for, right or wrong, they did the appellant no injury.—1 Brick. Dig. 780, § 96.

Affirmed.

BRICKELL, C. J., dissenting.

## Westmoreland v. Porter.

### *Assumpsit.*

1. *Statute of frauds; when promise to answer for debt of another not within.*—A promise to pay the debt of another is not within the statute of frauds, where the promisor is interested in property on which the creditor has a lien for the payment of the debt, and, in consideration of the promise, the lien is relinquished, and its relinquishment enures to the promisor's benefit.

2. *Same; forbearance to enforce debt not sufficient to take promise out of its influence.*—The mere forbearance by a creditor to enforce his debt,

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while a sufficient consideration to support a guaranty of the debt by another, is not sufficient to take the guaranty out of the influence of the statute of frauds.

3. *Same*.—Hence, an agreement in writing by which a merchant, having a lien on a crop grown on rented land for advances, subordinate to an unsatisfied lien for rent, acknowledges himself the tenant's surety for the rent, in consideration of a forbearance by the landlord to enforce his lien, which is not expressed, is void under the statute.

4. *Same ; when agreement not within*.—If, however, a part of the consideration of such agreement was a release by the landlord of a portion of the rent, and such release enured to the surety's benefit, this would take the agreement out of the influence of the statute, although not expressed in the writing.

5. *Rescission of executed contract ; consideration for*.—A contract which has been executed by one party, only leaving an obligation to pay on the other, can not be rescinded by mutual consent, without other consideration ; but its obligation can only be discharged by full payment, release, or accord and satisfaction.

## APPEAL from Lawrence Circuit Court.

Tried before Hon. H. C. SPEAKE.

This was a suit by Theo. Westmoreland against R. B. Porter, to recover damages for the alleged breach of an agreement in writing executed by the defendant on 29th December, 1880, by which he "acknowledged" himself "security" for the payment to the plaintiff, within thirty days, of \$650, as a balance due from one J. M. McGehee for the rent of plaintiff's plantation, in Lawrence county, for the year 1880 ; the complaint alleging the circumstances under which the agreement was made, and the consideration supporting it. It is admitted in the complaint that the defendant was entitled to a credit of \$276.70, of date 1st July, 1881. The defendant pleaded, in short by consent, (1) "the general issue, with leave to give in evidence any special matter which would be a good defense, if well pleaded and proved ;" (2) "statute of frauds ;" (3) "failure of consideration ;" and (4) "no consideration for the instrument sued on." The cause was tried on issues joined on these pleas, the trial resulting in a verdict and judgment for the defendant.

The plaintiff proved on the trial that, on 1st October, 1879, he rented to J. M. McGehee a certain plantation in Lawrence county, known as the "Lightfoot plantation," for the year 1880, McGehee executing to him an instrument in writing, by which he promised to "pay" the plaintiff, on 15th November, 1880, twenty bales of cotton of a designated weight and classification, for the rent of said place for said year, and agreed "that the crop produced on said plantation is bound for the payment of said amount, for the rent thereof." The evidence introduced on his behalf further tended to show that, in December, 1880, McGehee owed the defendant \$800 or \$1000, for advances made by the latter to the former, to enable him to

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make a crop, for which he had a lien on the crop, "secondary to the lien for rent;" that on 28th December, 1880, one Lane, as attorney for the plaintiff, went to "Town Creek, in Lawrence county, near which place the Lightfoot plantation is situated," for the purpose of collecting the amount which McGehee owed the plaintiff for rent, "by attachment or otherwise, as might seem best," he taking with him the instrument executed to the plaintiff by McGehee; that at the time of his arrival at Town Creek, there were five or six bales of cotton, part of the crop grown on said plantation, at the depot for shipment, and Lane notified the railroad agent that he had a lien on it, and not to ship it; that, on Lane's arrival at Town Creek, he saw the defendant, and advised him of the purpose of his visit, when the defendant told Lane of his lien for advances, and insisted that if the latter sued out an attachment against the crop, it would be so wasted in gathering, and so consumed by costs, that he, defendant, would be unable to collect anything on his debt; that thereupon McGehee was sent for, and, after a conference between the three parties, "for the purpose, on the part of McGehee and Porter, of making some arrangement that would obviate the necessity of attaching the crop, an agreement was reached between them, Porter, McGehee and Lane, by which the value of the note for twenty bales of cotton was fixed at \$1050; that Porter, in the presence, and with the concurrence and agreement of McGehee, [proposed] that if Lane, as plaintiff's attorney, would reduce the note from \$1050 to \$850, McGehee would raise \$200, the estimated value of the cotton at the depot, on said cotton, and would pay it on the note, thus reducing the amount still due on the note to \$650, and would turn over the crop to Porter, McGehee consenting thereto, and forbear his right of attachment, and give McGehee thirty days additional time on the note, he, Porter, would become McGehee's security for the payment of said balance of \$650 within thirty days;" that Lane, acting for the plaintiff, acceded to this proposition; made a memorandum on the back of the instrument executed by McGehee to the plaintiff, called a note by the parties, agreeing "to receive \$850, as payment for within note from J. M. McGehee;" received from McGehee \$200, the estimated value of the cotton at the depot, and indorsed on said instrument a credit therefor; forbore plaintiff's right of attachment, "and gave McGehee thirty days further time to pay the note; and turned over to Porter, with McGehee's consent and agreement, the crop on the Lightfoot place, and McGehee's note for collection to the defendant, Porter, who thereupon became McGehee's surety for the payment of the balance of \$650, and evidenced this contract of suretyship by a paper-writing in the



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words and figures following, to-wit: 'Received of Theo. Westmoreland a rent note for collection. By agreement said note was changed from ten bales of low middling cotton, and ten bales of good ordinary, to \$850, which is to be received as rent for Westmoreland's place. I also acknowledge myself security for the payment of \$650, balance due on said note, said payment to be made in full within thirty days from date.

(Signed) R. B. PORTER.'

"December 29th, 1880."

This is the instrument sued on. It was also shown that McGehee was, and had been, "since and including the winter of 1880-81," insolvent.

The defendant was examined as a witness in his own behalf, and, after testifying touching the advances made by him to McGehee, further testified that "he agreed to become McGehee's surety for the balance of \$650, to prevent the crop from being consumed in costs, etc., of attachment, but that there was no reduction in the note of McGehee from \$1050 to \$850, but the latter amount was the estimated value of the note; that Lane turned over the crop to him under said agreement, and delivered to him McGehee's note, but that the indorsement now on it about changing note to \$850 was not on the note when he received it;" that he afterwards returned the note to the plaintiff; that in latter part of January, 1881, having been unable to "make headway" gathering the crop on account of the weather, he notified the plaintiff to come down and make his money; and that plaintiff came to Town Creek in response to the notification, when he had a conversation with him, plaintiff. Defendant was then asked by his counsel, "whether or not, in this conversation, the plaintiff released him, defendant, from his contract as McGehee's surety, or whether it was then and there mutually agreed between plaintiff and defendant that said contract should be rescinded." To this question the plaintiff objected, but his objection was overruled, and he excepted. To this question the witness then answered, "that, in this conversation, he told Westmoreland, the plaintiff, that he had been unable to gather the crop; that he was certain he, witness, would not get any thing out of it on his debt, and that he wanted plaintiff to release him from his contract, as McGehee's surety, for the payment of \$650, and make the money out of the crop; that there was enough crop to pay the rent; and that, thereupon, plaintiff said he would release witness, and rescind the contract of suretyship, and go on McGehee for the original contract for twenty bales of cotton." To this answer the plaintiff objected, but his objection was overruled, and he excepted. It was then shown by the testimony of the witness that McGehee was not present at the conversa-

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tion, and was not consulted as to the release or the rescission of the said contract; and that the agreement to rescind "was without the payment to the plaintiff of any money or thing of value therefor, and that the plaintiff received nothing for relinquishing his rights under the contract." Thereupon the plaintiff moved to exclude from the jury the defendant's testimony touching the "release or rescission;" but the court overruled the motion, and to this ruling the plaintiff excepted. The plaintiff also reserved exceptions to the admission in evidence, against his objection, at defendant's instance, declarations made by the plaintiff to third parties, tending to show that he had released the defendant from liability on his said contract of suretyship, and had rescinded the same. It was also shown on behalf of the defendant that on 27th January, 1881, the plaintiff sued out an attachment against McGehee, to recover \$850, for the rent of said place for the year 1880; that the attachment was levied on McGehee's crop raised on said place during said year; and from the sale of the crop levied on, the plaintiff realized \$276.70. In rebuttal, the plaintiff introduced evidence tending to corroborate the evidence already introduced by him, and tending to show that he had never released the defendant from, and had never rescinded said contract of suretyship. The foregoing is the substance of the evidence introduced on the trial of said cause, material to the questions decided by this court.

The plaintiff reserved numerous exceptions to portions of the general charge, to charges given at defendant's request, and to the refusal of the court to give charges requested by the plaintiff; but as the only questions raised by these exceptions and passed on by this court are, (1) whether the contract of suretyship was within the statute of frauds, and (2) whether there had been a valid rescission of that contract, or a valid release of the defendant from liability thereon, it is not deemed necessary to further extend this report by setting out the charges to which the exceptions relate. The rulings on the admissibility of evidence, above noted, and in charging the jury are here assigned as error.

McCLELLAN & McCLELLAN and E. H. FOSTER, for appellant.  
(1) The contract sued on was an *executed* contract. While an *executory* contract may be avoided by mutual consent to a rescission, without any extraneous consideration, an *executed* contract can not be *rescinded* at all. To avoid an executed contract, there must be, in substance, a *release*; and a release must, in all cases, be supported by a valuable consideration, extraneous to the contract itself. This point elaborately discussed, with citation of following authorities: *Robinson v. Bullock*, 66 Ala.

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554; *Nesbitt v. McGehee*, 26 Ala. 748; *Hunt v. Barfield*, 19 Ala. 117; *Walker v. Greene*, 22 Ala. 679; Add. on Con. 1072, 1074, 1110; 54 Ala. 127; 7 Ala. 182; 18 Ala. 254; 21 Ala. 424; 15 La. 520; 9 Mass. 78; 15 Mo. 315; 42 Pa. St. 165; 4 Stew. & Port. 192; 17 Johns. (N. Y.) 340. (2) The contract was not within the statute of frauds. See 6 Ala. 694; 19 Ala. 100; 20 Ala. 309; 21 Ala. 721; 54 Ala. 122; 1 Brick. Dig. p. 386, § 169; 46 Ala. 45.

W. P. CHITWOOD, *contra*. (1) The contract sued on was rescinded by mutual consent. This proposition discussed at length, with citation of following authorities: 2 Pars. on Con. (2 Ed.) 190-1; 1 *Id.* 391; 1 Brick. Dig. p. 394, § 233; *Glover v. McGilvray*, 63 Ala. 508; *Cooper v. McIlwain*, 58 Ala. 296; *Burkham v. Mastin*, 54 Ala. 122. (2) The contract was within the statute of frauds, and void.—Code, 1876, § 2121; *Rigby v. Norwood*, 34 Ala. 129.

SOMERVILLE, J.—The agreement sued on purports on its face to be one of mere suretyship on the part of the defendant, Porter, in which he obligates himself to pay the plaintiff an antecedent debt of six hundred and fifty dollars, due to the plaintiff by one McGehee. The agreement itself is signed by the defendant alone, and does not express any consideration. One of the questions arising in the case is, whether this agreement is void within the influence of the statute of frauds, as “a *special* promise to answer for the debt, default or miscarriage of *another*.” It is required that agreements of this class shall not only be in writing and subscribed by the party to be charged, but that the written note or memorandum shall express the consideration.—Code, 1876, § 2121; *Rigby v. Norwood*, 34 Ala. 129; *Horton v. Wollner*, 71 Ala. 452.

There is an important class of cases, now fully recognized by all the authorities as not falling within the statute, which in *mere form* appear to be promises to answer for the debt of *another*, but which are, in reality and legal contemplation, promises to pay the debt of the *promisor* himself, and which would be binding upon him as a verbal obligation independently of any writing. This court has followed the line of decisions in this country which bring within this class all promises ostensibly to pay the debt of another, which constitute an original undertaking, based on a new and independent consideration, whether of benefit or detriment, moving between the newly contracting parties.—*Thornton v. Williams*, 71 Ala. 555; *Lehman v. Levy*, 69 Ala. 48; *Dunbar v. Smith*, 66 Ala. 490; *Burkham v. Mastin*, 54 Ala. 122; 2 Brick. Dig. p. 31, § 234, and cases cited. Our rulings on this point follow the doctrine



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announced in *Leonard v. Vredenburg*, 8 John. (N. Y.) 29, which, however, in its broadest scope, seems not to be the prevailing rule in this country.—Browne on Stat. Fr. §§ 207, 212; Validity Verb. Agr. (Throop), § 613. We do not desire, at this late day, to disturb the authority of these numerous adjudications.

None of the courts raise any controversy about those cases where the original debtor is discharged and the debt released, and a new debt and debtor substituted in their stead by a contract in the nature of novation. This class of cases is universally excepted from the influence of the statute of frauds. *Thornton v. Guice*, 73 Ala. 321; *Underwood v. Lovelace*, 61 Ala. 155; Browne on St. Fr. § 193.

The class which we are now discussing is of another kind than the last mentioned. It embraces agreements which are in form mere promises of guaranty or suretyship, the original debtor not being discharged or released. The essential and real function of such new agreement, however, is to pay a new debt contracted by the promisor upon a new consideration of benefit to himself and moving from the promisee, and although this becomes his own debt, he agrees to discharge it by paying a debt due by another, which is a mere incident of the transaction. "The substance of the transaction is undertaking to pay his own debt in a particular way."—Browne on Stat. Frauds, §§ 214a, 212; *Blount v. Hawkins*, 19 Ala. 100; *Dunbar v. Smith*, 66 Ala. 490. "The debt of another," as said in *Wolff v. Koppell*, 5 Hill (N. Y.), 458, "comes in incidentally as a measure of damages." And in such cases, the whole transaction, viewed as a new and independent contract, must be of such a character that it would support a promise by the defendant to the plaintiff to pay the same sum of money without reference to the existence of any debt from another, or a third person. *Chandler v. Davidson*, 6 Blackf. 367; Browne on Stat. Fr. § 212, and note 1, § 214a; *Emerson v. Slater*, 22 How. (U. S.) 28; 3 Addison's Contr. §§ 1111–1112.

A common illustration of this general class is found in cases where the defendant, or party sought to be charged, has received *property or funds placed in his hands*, and belonging to the original debtor, which he holds in a sort of *trust* capacity, and from which he has promised to pay the original debt.—Browne Stat. Fr. §§ 214e, 209 *et seq.*; *Lee v. Fontaine*, 10 Ala. 755; Throop on Verbal Agr. § 584, *et seq.*; *Fullam v. Adams*, 37 Vt. 391.

Still another illustration is found in cases where a creditor has a *lien* on his debtor's property, and a third person, having a subordinate lien, or other interest in the same property, promises the creditor to pay the debt in consideration of the relinquish-

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ment of the lien, which thus enures to his, the promisor's, benefit. These cases very clearly are promises to pay the promisor's own debt, and not mere guaranties of the debt of another.—3 Parsons' Contr. 25; Browne on Stat. Fr. §§ 214c, 214e.

The rule governing this particular class of cases is thus expressed in a recent treatise where the authorities are all reviewed with discrimination and ability. "A promise to pay the debt of another," observes this author, "is not within the statute, if its consideration was the abandonment to the promisor of a security for the payment of the debt, consisting of a *lien* upon, or *interest* in property, to which the promisor then had a subordinate title."—Validity Verb. Agreements (Throop), § 571 *et seq.* The old rule was that a verbal promise to pay another's debt would be supported by a mere surrender of a lien on the property of the original debtor, whether made for his benefit, or that of the new promisor. Perhaps a case of this kind would come within the rule settled by our own decisions. But the great current of modern authority clearly sustains the view, that the new promisor must have an *interest* of some kind in the property to which the lien attached, so that its surrender will enure to his benefit. He thus becomes the *purchaser* of the lien, or of the interest of the promisee in the property thus encumbered at a price measured by the amount of the original debt, which he agrees to pay. This precise point, however, as to the person in whose favor the lien is surrendered, we need not decide, contenting ourselves with a citation of some of the authorities bearing on the question.—Browne on Stat. Frauds, §§ 214c, 224d; Validity Verb. Agr. (Throop) §§ 594, 595, *et seq.*, 603; *Nelson v. Boynton*, 44 Mass. (3 Metc.) 396; *Dexter v. Blanchard*, 93 Mass. (11 Allen) 365; *Mallory v. Gillett*, 21 N. Y. 412; *Brown v. Weber*, 38 N. Y. 187; *Landis v. Royer*, 59 Penn. 95; *Corkins v. Collins*, 16 Mich. 478; *Dunbar v. Smith*, 66 Ala. 490.

Whatever may be the correct principle as to this point, there can be no doubt of the proposition, that where the promisor *is* interested in the property, and the relinquishment of the lien *does* enure to his benefit, the promise does not come within the statute of frauds, and not only need not express the consideration if in writing, but need not be in writing at all.

The agreement here sued on is, as we have said, in form a guaranty, or promise of suretyship. There are but two facts which can be urged, with any degree of force, as constituting a consideration for it. The first is the forbearance of the plaintiff to enforce his demand by the levy of an attachment on McGehee's crops, whether for a definite or indefinite period of time. The second is the alleged relinquishment of *two hundred dollars* of the original debt of McGehee, which enured to

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the benefit of the defendant *pro tanto*, he having a second lien on the same crops for advances, subordinate only to that of the plaintiff which was for rent. It is not contended, nor does the evidence tend to show that the lien of the landlord was otherwise waived or surrendered.

While the forbearance of a creditor to enforce his demand is undoubtedly a sufficient consideration for the guaranty of the debt by another, yet it is precisely one of that class of considerations which is required by the statute to be expressed in the written agreement of guaranty, and is uniformly held not to take the defendant's promise out of the influence of the statute.—*Musick v. Musick*, 7 Mo. 495; *Hilton v. Dinsmore*, 21 Me. 410; Browne Stat. Fr. § 190, note 2, and cases cited. The agreement itself expressing no consideration, it clearly came within the statute of frauds, and was, therefore, void, unless the jury believed that there was a release of some portion of the original rent debt due by McGehee, which, if released at all, it is not denied, enured to the benefit of the defendant. It is only in the latter aspect that it can be properly regarded as an agreement by the promisor to pay his own debt, and, therefore, not within the statute, or as supported by a valid consideration.

We discover no error in the charge of the court, or any of its rulings, touching this branch of the case, which, at least, was prejudicial to the appellant.

It was further insisted by the defendant in the court below that the contract or agreement sued on was *released* or *rescinded* by mutual agreement of the defendant and the plaintiff. The evidence tends to show that this was agreed to be done by a mere declaration of the parties, without any consideration whatever moving from the promisor to the promisee. It is unnecessary that we should enter into any discussion as to the circumstances under which contracts may be rescinded or modified by mutual consent, without other consideration. The cases are numerous in which the general rule on this subject has been stated.—*Cooper v. McIlwain*, 58 Ala. 296; *Burkham v. Martin*, 54 Ala. 122; 1 Brick. Dig. p. 394, § 233; Bishop on Contr. §§ 665–672.

It is enough to say that if the contract has been performed, or executed on one side, and only money remains to be paid on the other, the case is manifestly like that of any other debt, and can only be discharged in like manner.—Bishop on Contr. § 672. It is a fundamental principle of our system of jurisprudence, that “an agreement to abandon a claim, unless there be a consideration shown, is a mere *nudum pactum*.”—1 Addison on Contr. § 363. If the present contract can be sustained as valid, so far as the evidence shows, it must be upon the theory of a



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purchase by the defendant of a certain interest from the plaintiff in the crops of his tenant, McGehee. This was executed by a delivery. There can, therefore, be no essential or sound distinction between this case, and the ordinary one of a contract for the sale of goods, where the goods have been sold and delivered. In such cases it is well settled that a naked agreement that the contract be rescinded or annulled will not discharge or release the purchaser from his liability to pay the purchase-money.—*Edwards v. Chapman*, 1 M. & W. 231; 1 Add. Contr. (Amer Ed.) 1878, § 363. This can only be done by full payment, release, or accord and satisfaction.—*Nesbitt v. McGehee*, 26 Ala. 748; *Holloway v. Talbot*, 70 Ala. 389.

In this view of the case, it is immaterial whether McGehee was legally or in fact a party to the agreement sued on or not. The evidence did not tend to show any rescission or release of the debt due the plaintiff, the alleged agreement to rescind being a mere *nudum pactum*, without binding force on the plaintiff, because unsupported by any consideration. The court erred in its rulings on this branch of the case, and the judgment must be reversed and the cause remanded.

## Adams v. Phillips, Ex'rx.

### *Bill in Equity to enforce Vendor's Lien on Land.*

1. *Amendment to bill in equity; relation to commencement of suit.* The rule is general, in a court of equity, that an original and amended bill is to be regarded simply as an entirety, constituting but one record, the amended bill relating back to the filing of the original bill; but this doctrine of relation, being a fiction of law intended to promote the administration of justice, is never permitted to operate so as to prejudice the right, or to work injustice.

2. *Same.*—If, in the exercise of the right of amendment, new matters or claims are asserted, not within the *lis pendens*, if the amendment is not merely and strictly remedial, curing a defective or imperfect statement of the cause of action in the original bill, or merely modifying or varying its allegations, the matter or claim introduced by the amendment will not be referred to the filing of the original bill, to the prejudice or injury of the parties against whom the amendment is made; but if the amended bill asserts the same title, seeks the same relief, corrects only an erroneous statement of the cause of action in the original bill, or supplies a defective statement, not introducing any new matter or claim, it relates back to the filing of the original bill.

3. *Same.*—A demurrer to an original bill, filed to enforce a vendor's lien on land, having been sustained on the ground, that the contract of sale affirmatively appeared to be within the statute of frauds (it resting, according to the averments, in parol merely, and possession under it only being averred), an amendment seeking to avoid the statute of frauds

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by the additional averment of a contemporaneous part payment of the purchase-money, being strictly remedial of an imperfect statement in the original bill of facts attending the making of the contract, relates back to the filing of the original bill, although the effect of such relation is, to take the complainant's demand without the bar arising from the lapse of time, if computed from the filing of the amendment.

APPEAL from Elmore Chancery Court.

Heard before J. M. FALKNER, Esquire, acting as Special Chancellor.

The facts are sufficiently stated in the opinion.

PARSONS & KELLY and WATTS & SON, for appellants.

JOHN A. TERRELL, *contra*.

BRICKELL, C. J.—The bills, original and amended, are filed to enforce the lien of a vendor on lands for the payment of the purchase-money. The cause was before the court at a former term, on appeal from a decree of the chancellor overruling a demurrer to the original bill, assigning as a cause that by the bill it was affirmatively shown the contract, or agreement of the purchaser to pay the purchase-money, was within the statute of frauds.—*Phillips v. Adams*, 70 Ala. 373. The decree was reversed, and the cause remanded; and in the court of chancery the amended bill was filed, alleging, in addition to the facts stated in the original bill (the making of the contract by the purchaser verbally, and that under it he was let into possession), the contemporaneous part payment of the purchase-money. Upon a final hearing, the bill was dismissed, upon the specific ground, that as more than twenty years had elapsed after the purchase-money was due and payable, before the institution of the suit to enforce the lien, during which period no recognition or admission of the debt by the purchaser was shown, the demand was stale, and incapable of enforcement. The hypothesis of the decree, however correct in point of law, is untrue in point of fact, if the lapse of time is to be computed from the day the purchase-money was payable to the filing of the original bill; but it is true, if the time is to be computed to the filing of the amended bill, and the filing of the original bill did not arrest or interrupt its running.

The rule is general, in a court of equity, that an original and amended bill are to be regarded simply as an entire bill, constituting in fact but one record. So far as the equity of the bill is involved, the amended bill has relation to the commencement of suit by the filing of the original bill.—*Blackwell v. Blackwell*, 33 Ala. 57; *Crews v. Threadgill*, 35 Ala. 334; *Cain v. Gimon*, 36 Ala. 168. This is a fiction of law, intended

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to promote the administration of justice, and is never permitted to operate so as to prejudice the right, or to work injustice. It is the proper office of an amended bill to introduce new parties defendant to a pending suit in equity—parties who would not have been bound by a decree therein rendered in their absence. It would be gross injustice, if the relation of the amended bill to the commencement of suit was allowed to operate so as to deprive them of any substantial, meritorious defense, which would be available in bar of a new, distinct, independent suit. *Miller v. McIntyre*, 6 Peters, 61; *Woodward v. Ware*, 37 Me. 563. The present statute of amendments is broad and liberal, allowing to a complainant, as matter of right, at any time before final decree, to file an amended bill, “to meet any state of evidence which will authorize relief.”—Code of 1876, § 3790. The only limitation upon the right of amendment, as the statute has been construed, is, that there must not be a radical departure from the cause of action upon which the original bill is founded, nor must a case entirely new be introduced, nor an entire change of parties wrought. Within this limitation, the right to amend is co-extensive with the errors, omissions, defects, or imperfections, existing in the original bill, which, if not cured, would prevent the complainant from obtaining relief to which he may be entitled.—*Pitts v. Powledge*, 56 Ala. 147; *Moore v. Alvis*, 54 Ala. 356. But if, in the exercise of the right of amendment, new matters or claims are asserted, not within the *lis pendens*; if the amendment is not merely and strictly remedial, curing a defective or imperfect statement of the cause of action in the original bill, or merely modifying or varying its allegations; the matter or claim introduced by the amendment will not be referred to the filing of the original bill, to the prejudice or injury of the parties against whom the amendment is made. In *King v. Avery*, 37 Ala. 173, which was decided very soon after the enactment of the statute, and which is recognized as the leading authority upon the point now under consideration, the court said: “If, during the pendency of a suit, any new matter or claim, not before asserted, is set up and relied upon by the complainant, the defendant has a right to insist upon the benefit of the statute (of limitations), until the time that the new claim is presented; because, until that time, there was no *lis pendens* as to that matter, between the parties. On the contrary, if the amendment set up no new matter or claim, but simply vary the allegations as to a subject already in issue, then the statute will run only to the filing of the original bill.”

The amended bill introduced no new matter or claim, not asserted in the original bill, and which was not within the existing *lis pendens*. There is no variation of the title of the



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complainant; each bill is founded on the same contract, and seeks the same relief. The amended bill introduced no new fact, other than the part payment of the purchase-money, which withdraws the contract from the operation of the statute of frauds. In truth, the amendment is strictly remedial of an imperfect statement in the original bill of facts attending the making of the contract. Before the statute, under the general rules of chancery practice, the amendment would have been allowed, as matter of right, at any time before issue joined, and subsequently at any time before final decree, in the exercise of the discretion of the court. An amended bill, asserting the same title, seeking the same relief, correcting only an erroneous statement of the cause of action in the original bill, or supplying a defective statement, is not to be regarded as introductive of *new matter*, or a *new claim*. It performs the proper office of an amended bill, as recognized in a court of equity. Such being the character of the amendment, it had relation to the filing of the original bill; and it is from that period only the bar of the complainant's demand, arising from the lapse of time, can be computed.

The questions suggested by counsel, as to the admissibility or effect of the evidence, do not seem to have been considered by the chancellor, are not probably within the assignments of error, and we are not inclined to pass upon them.

Let the decree be reversed, and the cause remanded.

## Loeb & Bro. v. Drakeford.

*Bill in Equity by Creditor to Subject Securities held by another Creditor to Payment of his Demands.*

1. *Joint power of attorney: how exercised.*—In private agencies, a joint power of attorney to two or more persons can not be executed by one of them alone; but in its execution all must act jointly.

2. *Same; delegation of.*—Nor can one of the agents delegate to another authority to act for him in the execution of such power.

APPEAL from Montgomery Chancery Court.

Heard before Hon. JOHN A. FOSTER.

This was a bill in equity by Loeb & Bro. and Griel Bros. & Co. against A. H. Drakeford and others, as the executors of the last will and testament of Thomas B. Dryer, deceased, and Lehman, Durr & Co. and others; and was filed on 1st August, 1882. The purpose of the bill, and the facts necessary to an

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understanding of the points decided, are sufficiently stated in the opinion.

On the hearing, had on pleadings and proof, the chancellor, being of the opinion that the complainants were not entitled to relief, caused a decree to be entered, dismissing the bill; and that decree is here assigned as error.

SAYRE & GRAVES, for appellants.

W. C. BREWER, *contra*.

SOMERVILLE, J.—The purpose of the present bill is to claim the benefit of certain mortgages and other collateral securities placed in the hands of Lehman, Durr & Co. by one Thomas B. Dryer, in the latter part of the month of March, in the year 1881. Dryer was indebted to complainants for advances made to him during that year, and also for antecedent debts aggregating about two thousand dollars, and based on previous transactions. The theory of the bill is, that there was an express agreement made by Dryer, during his life-time, that the old, or pre-existing debt should be paid out of these securities. The whole question is as to the existence of such an agreement. It is not contended that such a contract was made with the deceased in person, but only with his authorized agents.

The written instruments introduced in evidence very certainly fail to furnish any satisfactory proof of it. The agreement between Dryer and Lehman, Durr & Co., bearing date on the 30th of March, 1881, extends the benefit of these securities only so far as to cover such indebtedness as might be afterwards incurred for advances made by the complainants to Dryer for the current year. No reference is made to any other indebtedness, except that due to Lehman, Durr & Co. as to which there is no controversy. The fact that the latter parties labored under the conviction that Dryer had made such a contract, and, upon the faith of such conviction, entered into a written agreement with complainants to hold the securities for them under the provisions of the supposed contract, could not, in any manner, prejudice the rights of Dryer's estate, if in truth and fact there was no such contract. This proposition is too manifest for argument.

It is claimed, however, that this agreement was authorized by one Felts, who acted under a written power of attorney executed by Dryer, and bearing date March 28th, 1881. The testimony shows very conclusively, that Felts did assent to such an arrangement, claiming his authority under a certain power of attorney, which was at the time exhibited to the other con-

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tracting parties. But this was a *joint* power of attorney, given to W. G. Campbell, M. B. Swanson and W. W. Felts, authorizing the three to act as agents in this transaction jointly. Such a power conferred upon several can not be exercised by one alone, at least in the case of private agencies. It is required that all must act together jointly in the execution of such an agency.—*Caldwell v. Harrison*, 11 Ala. 755; Story on Agency, § 42; Evans on Agency (Ewell's Ed.), \*32.

Nor could such a trust be delegated by one of such agents to another. The principal is supposed to rely upon the personal integrity and ability of each of his selected agents, these qualifications constituting the reason of the trust. Hence, the maxim applies, *Delegatus non delegare potest*.—Story on Contr. § 127.

We are satisfied from the testimony that neither Campbell nor Swanson concurred with Felts in the execution of this power. They were not personally present at the time, and are not satisfactorily shown to have afterwards assented to what he did in the attempted execution of their joint authority. The power was not, therefore, legally executed, and the contract made by Felts, acting alone, conferred no lien in favor of the complainants upon the proceeds of the various collateral securities placed by Dryer in the hands of Lehman, Durr & Co.

We see nothing in the record authorizing us to infer that any other person or persons had authority from the deceased, either to make or to ratify the contract attempted to be made between Felts and the complainants, as stated in the bill.

The decree of the chancellor is, in our judgment, free from error, and it is affirmed.

## East Tennessee, Virginia and Georgia Railroad Company v. Bayliss.

### *Action against Railroad Company for Injuries to Stock.*

1. *Statement of counsel in argument before jury; when a reversible error.*—In an action against a railroad company to recover damages for injuries to stock, counsel for the plaintiff, appellee in this court, speaking, in his concluding argument before the jury, of an engineer who was in charge of defendant's train at the time of the injury, and who had been examined as a witness on behalf of the defendant, said: "Engineers on railroads, like this engineer, have to emigrate if they do not conform to the wishes of their employers, and testify as their employers' interests require; they testify with a halter around their necks." *Held*, on exception reserved thereto by defendant,



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(a) That if this had been stated as an inference or opinion, based on the witness' connection with the railroad, and with the act complained of as negligent, counsel would have kept within legitimate bounds.

(b) But having been stated as a fact, not as an inference or opinion, and the bill of exceptions, which purports to set out all the evidence, not showing any fact or circumstance in evidence which justified such a line of argument, it should have been ruled out, and the jury cautioned against allowing it to have any influence with them; and the failure of the court to so rule is a reversible error.

2. *Liability of railroad company for injury to stock; when omitted duty fails to confer right of recovery.*—A railroad company is not necessarily liable for injuries done to stock, on proof tracing some acts of omitted duty to the company's employees; if the omitted duty did not cause, or in any way contribute to the injury, its omission confers no right of recovery.

3. *Same.*—Nor is it necessary that the company's employees shall attempt the impossible; and hence, if, without fault of such employees, a danger is not, and can not be discovered until all appliances known to the best regulated railroad motive power are clearly powerless to avert, or mitigate the injury, then a failure to apply such useless agencies imposes no liability; and particularly would this be the case, if, by attempting the impossible, the chances of another or greater peril would be increased.

4. *Same.*—The engineer, while attending to the other wants of his train, must be constantly on the lookout for obstructions on the track; and this requirement is met, when he bestows on the service that steady, regular care and watchfulness which his other duties would allow a very careful and prudent person to give to it.

#### APPEAL from Lawrence Circuit Court.

Tried before Hon. H. C. SPEAKE.

This suit was brought by John K. Bayliss against the East Tennessee, Virginia & Georgia Railroad Company, a corporation operating a railroad in this State, to recover damages alleged to have been suffered by the plaintiff, by reason of the negligent killing of a horse belonging to him by defendant's locomotive. The cause was tried on issues joined on the pleas of not guilty and the statute of limitations of one year, the trial resulting in a verdict and judgment for the plaintiff.

No eye-witnesses to the killing were examined by the plaintiff; but the evidence introduced on his behalf tended to show that his horse was killed by the locomotive of the defendant's "west-bound" passenger train, on the morning of the 16th October, 1881, before daylight; that the horse, just prior to being killed, ran along the side of defendant's track, most of the way near the ends of the cross-ties, in the direction in which the train was moving, about one hundred and seventy-five yards, and was killed in attempting to cross the track; that the train was running on a down grade; and that the track was straight and unobstructed for about one mile east of the place where the horse was killed. The value of the horse was shown.

The defendant examined as a witness the engineer who was

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in charge of the locomotive by which the horse was killed, who testified, in substance, among other things, that he never saw the horse until it sprang on the track about ten feet in front of the engine; that the instant he saw it, he reached his hand up to sound the cattle alarm, but before he could do so, the engine had struck the horse; that when it sprang on the track, the front of the engine was so near it, that it was impossible to stop the train, or to reverse the engine, or to sound the cattle alarm, or to ring the bell, or to do any thing, before the horse was struck; that the head-light on his engine was as good as any in use by any railroad, and was, at the time of the accident, in good order and burning brightly, but by it he was not able, at that time of night, to discover an object more than one hundred yards ahead of him on the track; that "the head-light, by reason of the focus of its light, enables an engineer to see objects at some distance on the track better than objects near at hand, and that objects on the track could always be seen by the head-light better than objects on the side of the track;" that "by use of his head-light he was enabled to see on either side of the track, at the distance of one hundred yards, about twenty-five or thirty feet, at the distance of fifty yards about twenty feet, and at the distance of ten or fifteen yards, about four or five feet, beyond the cross-ties;" that "when the horse sprang upon the track, it came at right angles with the track, and was struck broadside;" that at the time of the injury he was running on a down grade at the rate of thirty-five or forty miles an hour; that he was several minutes late, having been delayed by a connecting line, and he had been endeavoring "to make up the time so lost whenever and wherever he could, as required by defendant's schedule," but that, at the time of the injury, "he was not exceeding, but was obeying the directions of his schedule;" that when he entered the down grade, near the place of the killing, "he was careful to shut off steam, because the impetus already acquired, and the weight of the train rolling down the grade were sufficient, without the addition of steam power, and that it is usual for engineers to do this when they reach a down grade; that he was, at the time, and until he struck said horse, in the constant and active discharge of all the duties pertaining to his position, including the duty of shutting off the steam, and of looking after the water in his boiler to prevent its getting too low, of watching the steam connections with his air brakes, and observing the time he was making, and the schedule regulations upon which he was running; and, in addition to all these, when his attention was not necessarily called off by these other duties, he was keeping a constant and vigilant lookout; that he could not have seen said horse before he did see it

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(which was too late to avert the injury by the use of any human agency), if the horse had been his own property, instead of the plaintiff's; that if a tree had fallen across the track, at the place where said horse was killed, he could not have seen it, at the time of night in question, by the light of his head-light within a less distance than one hundred yards, and, at the speed he was going, he could not have stopped the train within a less distance than two hundred and fifty yards, although his life depended upon it, by the use of any human appliances;" and that "he was keeping a sharp lookout, and did not see any obstacle or any object anywhere until the animal made the sudden leap on the track as stated." The defendant also offered evidence tending to show that its road-bed and track were in good order; that its locomotive and cars, and the equipments and appliances thereof, were of the best and most approved kind, and in perfect order, and that the engineer was faithful, capable and efficient, and among the best on the road. Defendant also introduced evidence tending to show that the horse had been grazing on the north side of the track, not far from an embankment about four feet high; that it ran along the side of said embankment, as indicated by its tracks, and along a ditch succeeding the embankment on the west, for ninety feet, when it attempted to cross and was killed; and that there was some undergrowth about the embankment, where stock had been grazing. The bill of exceptions purports to set out all the evidence, the substance of the material portions of which are stated above.

The court charged the jury, *ex mero motu*, among other things as follows: (1) "If the jury believe from the evidence that the engineer in charge of the train, on perceiving the horse on the track of the road, failed to use all the means within his power, known to skillful engineers (such as the application of his brakes, and the reversal of his engine, etc.), in order to stop the train; and the jury further believe that the engineer had time to apply his brakes, and reverse his engine, and use all means in his power to stop the train, then the engineer would be guilty of negligence." (2) "It is for the jury to determine, from all the evidence, whether or not there was negligence upon the part of the engineer." To these portions of the general charge the defendant excepted, and also to the following charge, among others, given at the plaintiff's request: 1. "Engineers, in running trains, should always be on the lookout for obstructions; and when discovered, no matter when or where, should promptly resort to all means within their power, or known to skillful engineers, to escape the impending danger, or to avert the threatened injury; and engineers should exert a proper degree of watchfulness in order to discover ob-



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structions upon the track. Less than this is not due diligence."

As recited in the bill of exceptions, "during the progress of the final argument by plaintiff's counsel to the jury, he made the following statement: 'Engineers on railroads, like this engineer, have to emigrate if they don't conform to the wishes of their employers, and testify as their employers' interests require. They testify with a halter around their necks.' To this remark defendant immediately excepted, because it was the statement of facts as facts, of which there was no evidence. The presiding judge simply said to defendant's counsel, 'Take your exception.' Thereupon plaintiff's associate counsel said, 'Go ahead; let them take their exception.' And there was no withdrawal, or attempt at withdrawal of said remark by said counsel; but he added that he had not desired to do injustice to defendant, or its engineer. Nor was any instruction given in reference thereto by the court."

HUMES, GORDON & SHEFFEY, for appellant.

W. P. CHITWOOD and J. C. KUMPE, *contra*.

STONE, J.—In the concluding argument, counsel for the appellee, speaking of a witness who had testified for the defendant, said: "Engineers on railroads, like this engineer, have to emigrate if they do not conform to the wishes of their employers, and testify as their employers' interests require. They testify with a halter around their necks."

There is no question that an agent or employee in any case is supposed to be favorably inclined to the interests and wishes of his employer. This is natural and human, though not universal. And this bias, if bias it be, is all the more natural, if the agent be testifying to acts of his own performance. But, like all other witnesses, his testimony should be weighed fairly, impartially weighed; weighed by his intelligence, his manner, the consistency of his story, its probability or improbability, and all those other tests, by which a narration convinces us, or fails to convince us. The juror is in search of truth, and should be blind to consequences. When he follows his convictions implicitly, he vindicates the jury system, and his fitness for its duties.

Did counsel go beyond the boundary of legitimate argument in this cause?

Speaking of the rule in cases like this, we, in *Cross v. State*, 68 Ala. 476, said: "The statement" of counsel, to authorize reversal, "must be made *as of fact*; the fact stated must be unsupported by any evidence, must be pertinent to the issue, or its natural tendency must be to influence the finding of the

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jury, or the case is not brought within the influence of the rule." In the later case of *Wolffe v. Minnis*, 74 Ala. 386, the language of counsel, to which exception was reserved, was, that his client was a "large-hearted, great-souled, confiding, trusting man." There was no testimony to support this assertion, nor was there any thing in evidence from which it could be inferred. The design and tendency of the language evidently were to induce the jury to look favorably and charitably on any thing the client may have done, or, perhaps, testified to. Referring to these strong adjectives, we said, when they are used as attributes of character, they are facts, and are provable as other traits of character are, when they become a material subject of inquiry, if they ever can become so. We reversed the case, because the court did not instruct the jury to disregard such unauthorized statements, when thereto requested.

If what was objected to in this case had been stated as an inference or opinion, based on the witness' connection with the railroad, and with the act complained of as negligent, counsel would have kept within legitimate bounds. It was not so stated. It was stated as fact. Its meaning is, that there is a rule or custom with railroad companies to discharge their employees, if they do not testify "as their employers' interests require." If this be so, then, indeed, do "they testify with halters round their necks." Such terror, duress, or restraint, would be well calculated to exert its influence on many minds, and would materially impair the weight of testimony thus given. See, also, *Motes v. Bates*, 74 Ala. 374.

The record before us informs us it contains all the evidence, and there is nothing shown to justify the line of argument pursued. It presented the common case of the officers in charge of the train being the only eye-witnesses of the collision and injury. Such, of necessity, is generally the case. It would rarely happen that any person, other than the engineer and fireman, could have actual, personal knowledge of injury done to stock, and the circumstances attending such injury. The *onus* being on the railroad to disprove negligence, after the injury is shown, and the only possible means of making such exculpatory proof being through its own employees, its condition is deplorable in the last degree, if its only attainable witnesses are necessarily to be disbelieved, for no other reason than that they are employees of the railroad.

The language copied above should have been ruled out, should have been declared improper, and the jury should have been cautioned against allowing it to have any influence with them. We go further. When counsel trespass on the domain of unproven facts, the presiding judge should promptly set aside any verdict they may recover, unless he is clearly and affirmatively

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convinced the verdict is right, and would have been the same, in the absence of such unauthorized argument. The law, by imposing on railroads the duty and burden of disproving all acts of negligence, when they are shown to have inflicted an injury, is certainly exacting enough, without loading them down with additional burdens, that are neither proved nor provable. Corporations, under the same measure of proof, are entitled to the same verdict and judgment as individuals are entitled to. Less than this is not a verdict according to the evidence:

But in inquiries, such as those presented by this record, a second question of equal importance comes up. Did the alleged omission of duty cause the injury complained of?

When injury is shown, and some acts of omitted duty are traced to the railroad's employees, the railroad is not necessarily liable. If the omitted duty did not cause, or, in any way, contribute to the injury, its omission confers no right of recovery. Nor is it necessary that railroad employees shall attempt the impossible. If, without fault of such employees, a danger is not, and can not be discovered, until all appliances known to the best regulated railroad motive power are clearly powerless to avert, or mitigate the injury, then a failure to apply such useless agencies imposes no liability. And particularly would this be the case, if, by attempting the impossible, the chances of another or greater peril would be increased.—Code of 1876, §§ 1699, 1700; *M. & C. R. R. Co. v. Bibb*, 37 Ala. 699; *Ala. Gt. So. R. R. Co. v. McAlpine*, [*ante*. p. 113]; *Steele v. Char., Col. & Aug. R. R. Co.*, 11 S. C. 589.

That part of the general charge which was copied from *S. & N. R. R. Co. v. Williams*, 65 Ala. 74, is not erroneous. It does not, and was not intended to mean, that the engineer shall keep his eye steadily on the track before him, to the neglect of his other equally imperative duties. The movements of the eye are quick and rapid. The engineer, while attending to the other wants of his train, must be constantly on the lookout for obstructions; and he meets this requirement, when he bestows on the service that steady, regular care and watchfulness, which his other duties allow a very careful and prudent person to give to it. See this case when formerly here, 72 Ala. 20.

For the single error, the judgment of the circuit court is reversed, and the cause remanded.



[Fry v. Mobile Savings Bank.]

**Fry v. Mobile Savings Bank.***Trover for Conversion of Cotton Ties.*

1. *When contract of sale executory, not passing title.*—A contract for the sale of a designated number of bundles of cotton ties, which were never delivered, separated from the bulk, or set apart for the purchaser, or otherwise distinguished or pointed out as the particular bundles sold, is executory, and does not pass the title to the purchaser.

2. *Executory contract of sale of chattels; right of action against subsequent purchaser.*—The party contracting to purchase, in such case, having no title to the ties, legal or equitable, has no cause of action against a subsequent purchaser who has taken possession.

3. *When rulings in court below will not be reviewed on appeal.*—When a plaintiff, under the uncontroverted facts of the case, can never recover, on appeal by him, this court will not inquire as to the rulings of the primary court rejecting testimony and refusing charges requested by him.

**APPEAL from Mobile Circuit Court.**

Tried before Hon. WM. E. CLARKE.

As originally brought, this was an action of trover by the appellant against the appellee for the alleged conversion of 252 bundles of cotton ties. After the remandment of the cause on former appeal (*Mobile Savings Bank v. Fry*, 69 Ala. 348), a count in case was added, the nature of which is sufficiently indicated in the opinion. The court having overruled a demurrer interposed to this count, pleas were filed thereto, putting in issue the plaintiff's title to the ties sued for. The trial resulted in a verdict and judgment for the defendant.

As the evidence showed, the plaintiff, in 1875, contracted with one Cunningham for the purchase of 1000 bundles of cotton ties, which were in bulk with other ties of like quality, and bound in bundles of like character and size, and subsequently paid him therefor. These ties were not then delivered to the plaintiff, but were left on storage with Cunningham; and afterwards the latter delivered to the plaintiff, from time to time, all the ties so purchased except 252 bundles, which have never been delivered. Neither at the time the contract was made, nor afterwards, were the ties so purchased (except those which were from time to time delivered as above stated) counted, or separated, or set apart, or otherwise distinguished from the other ties held or owned by Cunningham. In February, 1876, the defendant purchased from Cunningham, and caused to be sold all the ties the latter then had on hand, about 400 bundles. At the time of this purchase, the balance of the

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ties which Cunningham had contracted to sell plaintiff, 212 bundles, were not separated or otherwise distinguished from the balance of the ties then on hand. For a fuller statement of the facts of the case, see report on former appeal.

The court charged the jury, at the defendant's written request, that if they believed the evidence, they must find for the defendant, and refused several charges requested by the plaintiff; and to these rulings, and to rulings on the admissibility of evidence, the plaintiff duly excepted, and here assigns the same as error.

JAMES COBBS and WATTS & SON, for appellant.

OVERALL & BESTOR, *contra*.

STONE, J.—There can be no question, under the testimony most favorable to appellants, that the contract by which Fry & Co. purchased one thousand bundles of cotton ties from Cunningham, was executory. The testimony of Fry and Cunningham prove that, in unmistakable terms. Save as they were delivered, on Fry's order, in part performance of the contract, they never were delivered, or separated from the bulk, or set apart for Fry. Even when the savings bank, through its president, made the purchase, the two hundred and fifty-two bundles, constituting the unpaid balance due Fry, lay undistinguished in a mass or bulk of four hundred bundles, and no one could have distinguished, or pointed out any particular bundles as belonging to Fry. The title to the undelivered ties never vested in Fry.—*Mobile Savings Bank v. Fry*, 69 Ala. 348.

After this cause returned to the circuit court, the complaint was amended by adding a count in case. *Rees v. Coats*, 65 Ala. 257, is relied on in support of this form of recovery. In that case Coats, the plaintiff, proved that he had a contract lien, or equitable, verbal mortgage, on the cotton alleged to have been converted by Rees. Having a *jus in re*—an interest in the thing itself—and that interest being equitable, we held that an action on the case lay for its conversion. This case is different. Fry's claim, if claim he have, is purely legal. If he acquired any title to the property, he acquired the whole title—a legal title. There is not an element of equitable title in it. He has a right of action against Cunningham, not for the ties; for he never acquired any title to them; his action is *ex contractu*, for non-compliance by Cunningham with his promise to deliver.—*Mobile Life Insurance Co. v. Randall*, 74 Ala. 170. He has no cause of action against the Mobile Savings Bank.

Having ascertained that under the uncontroverted facts of  
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this case the plaintiff never can recover, we need not inquire as to the several rulings rejecting testimony, and refusing charges requested. Even if there was error in such rulings, which we do not decide, it did not and could not injure plaintiff.

1 Brick. Dig. 780, §§ 96, 97, 98.

Affirmed.

## Meyer Bros. v. Mitchell.

### *Bill in Equity for Specific Performance of Contract for Purchase of Land.*

1. *Contract for sale of land ; when void for uncertainty in description.*—A contract for the sale of land, described therein as “ sixty acres Comida and Cone bottom, also ten acres hillside woodland adjoining the Mitchell tract,” unaided by extraneous evidence of identification of the land intended to be sold, is void for uncertainty.

2. *Same ; when description of land aided by parol.*—It is, however, competent to show by parol evidence, in aid of such contract, that, in pursuance of its terms, the land intended to be sold was pointed out and designated by the parties, and that the purchaser was placed in possession thereof ; and when thus aided, the ambiguity is cured, and the land identified by the acts and conduct of the parties.

3. *Same ; statute of frauds ; when party estopped from pleading it.*—Where a party bids in a tract of land at a public sale made by the administrator of a decedent's estate, under a decree of the chancery court, and afterwards, and before complying with the terms of sale, he transfers his bid to another in consideration that the latter will convey to him a portion of the land when he acquires title from the administrator, and to this the administrator assents, reports the sub-purchaser as purchaser, and thereafter, on payment of the purchase-money, conveys the entire tract to him, he is thereby estopped from denying the validity of the sale made by the administrator, or from asserting that is void under the statute of frauds.

4. *Specific performance of contract ; when decreed against privies.*—The rule is, that when specific performance of a contract would be decreed between the original parties, it will be decreed between all persons claiming by privity under them, unless some intervening equity prevents ; and a purchaser of land, with notice of a prior executory contract for the sale of the same land, stands in the shoes of his vendor, and holds his acquired title as trustee, and subject to the equities of the prior purchaser.

5. *Deposition ; when motion to suppress properly overruled.*—The deposition of a party examined as a witness in his own behalf should not be suppressed on the ground of a failure on his part to answer certain cross-interrogatories propounded to him, when there is nothing in his answers evincing an effort to evade the disclosure of facts within his knowledge, and, considering his comparative intelligence, all the questions propounded to him on cross-examination seem to have received answers fairly and substantially responsive.

6. *Exceptions to testimony ; when failure of chancellor to rule on, with-*



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*out injury.*—The failure of the chancellor to rule on exceptions to testimony, if it can be regarded as error, is error without injury, when his decree can be sustained by other testimony, to which no exceptions were taken.

7. *Contract attested by subscribing witnesses ; proof of execution.*—In a suit in equity for the specific performance of an executory contract for the sale of land, against the vendor and another claiming under him by subsequent conveyance, the execution of the contract, if denied by the latter, must be proved, although the denial is not under oath ; and if the contract is attested by subscribing witnesses, its execution must be proved by one or more of such witnesses, unless sufficient excuse is shown for not producing them.

8. *Specific performance of contract for sale of lands ; when averments of bill insufficient.*—Proof without allegation is as fatal to relief as is allegation without proof ; and hence, in a suit in equity for the specific performance of a contract for the sale of lands, which, unaided by extraneous evidence, is void for uncertainty in the description, relief can not be granted in the absence of averments identifying the lands, although they are sufficiently identified by the proof.

#### APPEAL from Dallas Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity, exhibited, on 17th May, 1882, by Andy Mitchell against Marcus, Joseph and Ferdinand Meyer, a mercantile partnership trading under the firm name of Meyer Bros., and against Carlos D. Rainey and R. B. Lovett, seeking the specific performance of a contract of purchase of land made by the complainant with the defendants Rainey and Lovett, who afterwards sold and conveyed the lands to their co-defendants, Meyer Bros.

As appears from the record, on 3rd December, 1877, the administrator of the estate of Alanson Saltmarsh, deceased, sold at public outcry, under a decree of the chancery court of Dallas county, several tracts or bodies of land situate in said county ; and at the sale one of these tracts, known as "Tract H," and containing eight hundred and forty acres, was bid off by, and knocked down to the complainant as purchaser ; the terms of sale being half cash, and the balance payable at twelve months, with interest. On 12th December, 1877, and before the complainant had made the cash payment on his purchase, he and the defendants, Rainey and Lovett, entered into a written contract, by which the complainant, in consideration of sixty acres of the land purchased by him and a house, transferred his bid and interest in the purchase made by him to them. That contract, omitting the signatures, is as follows : "We, R. B. Lovett and D. C. Rainey, have this day, the twelfth day of December, agreed to give Andy Mitchell sixty acres of land, viz., fifty acres Comida and Cone bottom, also ten acres hillside woodland, joining the Mitchell tract ; also one double house. In consideration of this, Andy has this day transferred his bid and interest in eight hundred and forty

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acres of the Saltmarsh land to said Mr. Lovett and said Mr. Rainey." This contract was signed by all the contracting parties and was attested by subscribing witnesses. The boundaries of the sixty acres to be retained by the complainant under the contract were discussed and understood at the time of the execution of the contract, and afterwards, were pointed out and designated by the parties, and the complainant was placed in possession of the land, and continued to remain in possession thereof, holding and claiming it under said contract, until some time in 1880, when Meyer Bros. took possession, repudiating the contract, and refusing to perform it by executing a conveyance thereof to the complainant, as demanded by him. The administrator of Saltmarsh's estate was informed of the contract soon after its execution, assented to it, and in his report of the sale, substituted Rainey as purchaser in place of the defendant, Lovett having retired, or by some arrangement with Rainey, not definitely shown, let the latter have his interest in the contract. Afterwards, the purchase-money having been paid and the sale confirmed, the administrator, under the orders of said court, conveyed the entire tract bid in at said sale by the complainant to Rainey, who went into possession of the land, except the sixty acres retained by complainant, shortly after said contract was executed, and continued in possession until some time in the early part of 1879, when, for a valuable consideration, he conveyed the entire tract to Meyer Bros., who purchased with knowledge of complainant's contract and possession. The boundaries of the land which complainant was to have under said contract, are shown by the proof, but not by the averments of the bill.

Meyer Bros. answered the bill, denying the execution of said contract between complainant and said Rainey and Lovett, as well as the other material facts of the bill relied on for relief; setting up the statute of frauds both as to the complainant's purchase at the administrator's sale, and as to the contract made by him with Rainey and Lovett; and insisting that they were purchasers for value, and without notice of said contract, or of complainant's interest in the land claimed by him. Decrees *pro confesso* were taken against the other defendants.

The chancery court overruled a motion made by Meyer Bros. to suppress the deposition of the complainant for an alleged failure to answer certain cross-interrogatories propounded by them to him, he having been examined as a witness in his own behalf; and the court also overruled objections made by said defendants to the introduction of said contract in evidence, and allowed it to be read; but failed to pass on objections made by them to parts of depositions taken and offered in evidence on behalf of the complainant.

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On the hearing, had on pleadings and proof, the chancellor caused a decree to be entered, granting relief to the complainant; and that decree, and the rulings above noted are here assigned as error.

WHITE & WHITE, for appellants.

SUMTER LEA, *contra*.

SOMERVILLE, J.—The bill is one for specific performance of a contract for the sale of land, having been filed by the vendee, Mitchell, against his vendors, Lovett and Rainey, and Meyer Bros., who were sub-purchasers under them, declining to recognize their contract of sale with the complainant.

There can be little or no doubt of the fact, that the description of the land agreed to be conveyed, as set out in the written agreement signed by the defendants, Lovett and Rainey, is void for uncertainty, standing alone and unaided by other and extraneous evidence identifying the subject-matter of the sale. This description is simply "sixty acres of land, viz., fifty acres Comida and Cone bottom; also, ten acres hill-side woodland [ad]joining the Mitchell tract."—*Thompson v. Gordon*, 72 Ala. 455.

The bill, however, alleges that, pursuant to the terms of the agreement, the particular sixty acres of land intended to be sold and conveyed was pointed out and designated by the parties, and that the complainant, Mitchell, was *placed in possession* of it, having done what was legally tantamount to the full payment of the purchase-money. Whether an ambiguity of this nature can be removed by oral evidence of surrounding facts, showing the situation and circumstances of the contracting parties, and serving to identify the subject-matter of sale, is a question in regard to which the authorities are greatly conflicting.—*Thompson v. Gordon, supra*. The general rule, everywhere recognized, is, that mere verbal declarations as to what was intended, are not admissible in explanation of the terms of the writing itself. A just exception to this rule, however, is found in parol evidence going to the *identification of the subject-matter*, a principle which seems to have been much favored by the past decisions of this court.

In *Chambers v. Ringstaff*, 69 Ala. 140, a description of lands in a mortgage, void on its face for ambiguity, was allowed to be aided by oral evidence showing that the grantor owned and resided on certain lands in this State, which were known and described by the same numbers as those employed in the mortgage. The ambiguity there arose from the fact that the description employed in the instrument was, on the face of it,



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equally applicable to many tracts of land located in various government surveys. The conclusion was reached upon the principle that parol evidence was admissible to show the surrounding or attendant circumstances under which the contract was made, and to identify the subject-matter to which the parties referred.

The case of *Ellis v. Burden*, 1 Ala. 458, decided by this court more than forty years ago, is a strong authority in support of the same principle as applicable to the present case. The defendant had there agreed in writing to execute a deed to complainant, conveying to him *three of sixteen* tenements, which the complainant had contracted to build, each tenement being rated at one thousand dollars in value. The written agreement was defective in not stating either the size of the lot to be conveyed, *which three* of the sixteen tenements were to be included, or the covenants which the deed was to contain. Parol evidence was held admissible to show that, while the work was in progress, the defendant had verbally agreed with the complainant as to which three particular tenements were to be selected and conveyed, that the selection was accordingly made, and upon this proof the complainant was decreed specific performance. This case may, perhaps, have gone too far in extending the application of a sound principle. It can be justified only on the theory that the selection of the three tenements was an *act* of negotiation, performed by the parties in the construction of their contract. It was an attendant *fact*, rather than a mere verbal declaration.

The case of *Mead v. Parker* (115 Mass. 413), 15 Amer. Rep. 110, presents a sound illustration of the principle under discussion. The property there agreed to be conveyed was described only as "a house on Church street." The court declared that it was not a question of the sufficiency of the writing under the statute of frauds, so much as of the right to resort to parol evidence in aid of the writing, with the view of identifying an ambiguous subject-matter. Parol evidence was admitted, showing the circumstances of possession, ownership, the situation of the parties, their relation as to each other and to the property, "as they were when the negotiations took place and the writing was made." It was said that the case could not be distinguished from *Hurley v. Brown*, 98 Mass. 545, where the writing disclosed an agreement for the sale of "a house and lot situated on Amity street," where parol evidence was admitted to identify the property intended to be sold.

The evidence shows, in the case at bar, that the complainant was placed in possession of sixty acres of land, under the written agreement to convey, a description of which is in accordance with the more general one given in the writing itself. This

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was, in our opinion, an act of the contracting parties conclusive of the identification of the subject-matter of sale. When aided by parol proof of this fact, the contract of conveyance was relieved of all ambiguity or uncertainty in this particular. The views of the chancellor as to this phase of the case are free from error.

The statute of fraud has no room for operation in this case. The complainant was possessed of a valuable right in his *accepted bid* for the tract of land purchased by him at auction sale from the administrator of Saltmarsh's estate. This tract included the sixty acres here claimed. The defendants, Lovett and Rainey, recognized not only the legal validity and binding force of the bid, but also its pecuniary value, and by this admission induced the complainant to stand aside and permit them to be *placed in his shoes*. This the complainant did, and thus they reaped the fruits of complainants' confidence induced by their own conduct. The administrator was the only party who could interpose the defense of the statute of frauds. He waived this objection, and, recognizing the validity of the sale, as well as the transfer of the complainants' bid, executed a deed to Rainey, which was done with Lovett's consent. Under this state of facts, Lovett and Rainey were *estopped* from denying the validity of the sale, or to assert that it was void under the statute of frauds. Having secured a valuable right by this admission, upon the faith of which complainant was induced to act to his prejudice, they and their privies in estate, Meyer Brothers, must now stand by the admission, whether it be true or false.

It is manifest that when the defendants, Meyer Brothers, purchased from Rainey the entire tract of land, described in the pleadings as tract "H," and containing about eight hundred and forty acres, they took it subject to any existing equity in favor of the complainant, Mitchell, of which they had notice, actual or constructive. The rule is, that when specific performance of a contract would be decreed between the original parties to the instrument, it will also be decreed between all persons claiming by privity under them, unless there be some intervening equity to prevent. A purchaser with notice stands in the shoes of his vendor, and holds his acquired title as a trustee, subject to pre-existing equities or incumbrances.—*Sawyers v. Baker*, 66 Ala. 292; *Brewer v. Brewer*, 19 Ala. 482; Willard's Eq. Jur. 298-99.

The proof is perfectly satisfactory to our mind that Meyer Brothers had notice of complainant's rights, both actual and constructive, before their purchase of these lands. The complainant was in actual possession of the sixty acre tract in controversy under his contract for purchase, and this fact operated

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as constructive notice of his equity.—*Brunson v. Brooks*, 68 Ala. 248. One of the firm, moreover, drafted the contract sought to be enforced in this suit, and knew that complainant was in possession of the land, claiming ownership under its provisions.

We can discover no error in the refusal of the chancellor to suppress the deposition of the complainant. We see nothing in his answers to the various interrogatories which evinces any effort to evade the disclosure of facts within his knowledge. All of the questions propounded to him seem to have received answers fairly and substantially responsive, considering the comparative intelligence of the complainant, as a witness. *Buckley v. Cunningham*, 34 Ala. 69; *Black v. Black*, 38 Ala. 111.

It is unnecessary to consider the failure of the chancellor to rule on the various exceptions taken by appellants to the testimony. If this could be regarded as error, it is error without injury, in as much as the decree as to these particular matters can be sustained by other testimony in the record, to which no exception is, or can be taken.

There is one exception taken to the admission of testimony, however, which should have been sustained. The written agreement sought to be enforced was attested by several subscribing witnesses, and its execution is directly and not incidentally drawn in question. As against the defendants, Lovett and Rainey, who *signed it*, the statute renders it admissible evidence without any proof of execution, unless such execution is denied by sworn plea.—Code, 1876, § 3036; *Hooper v. Strahan*, 71 Ala. 75. As against the other defendants, Meyer Brothers, however, by whom this instrument does not purport to be signed, it was clearly necessary to make proof of its execution, the statute having no application to mere strangers to the instrument. This proof could be made only by one or more of the subscribing witnesses, unless some excuse sufficient in law could be shown for not producing them.—*Ellerson v. The State*, 69 Ala. 1; 1 Greenl. Ev. § 569. The testimony of other than subscribing witnesses was incompetent for this purpose, unless a predicate had been first laid authorizing such secondary evidence.

For this error the decree of the chancellor must be reversed.

There is, moreover, a variance between the allegations of the bill and the proof, which seems to us fatal. This variance relates to the description of the land agreed to be conveyed. The description in the written agreement, as we have seen, is void for uncertainty, at least, without the aid of parol identification. This uncertainty is not obviated by any superadded description in the bill, although there is a general averment that the



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complainant was placed in possession of the lands agreed to be conveyed to him by Lovett and Rainey. If the averments of the bill had been taken as confessed, on decree *pro confesso*, the chancellor would have had no means of identifying the particular lands with such certainty as to enforce specific performance. It may be true that the testimony possibly furnishes such a description, but proof without allegation is as fatal as allegation without proof. The two must concur as well as correspond.—*Winter v. Merrick & Sons*, 69 Ala. 86. In suits of the present class seeking specific performance, great accuracy of averment is exacted, and strict corresponding proof required.—*Daniel v. Collins*, 57 Ala. 625.

The decree of the chancellor is reversed, and the cause remanded for further proceedings, should the complainant see fit to obviate the variance by an amendment of his bill.

## Dothard v. Denson.

### *Statutory Real Action in the Nature of Ejectment.*

1. *Adverse possession of land ; when not extended by constructive possession.*—Adverse possession of land, without color of title, is limited to actual occupancy ; the rule, that the possession of a part of a tract will be regarded as constructive possession of the whole, not applying to such a case.

2. *Same ; claim of easement confers no right to fee.*—The claim of a mere easement, or other right in land less than the entire fee, does not confer any adverse right to the fee ; but, to have that effect, under the statute of limitations, "the claim must be of the entire title, exclusive of the title of any other person."

ALPEAL from Cleburne Circuit Court.

Tried before Hon. LEROY F. BOX.

This was a statutory real action in the nature of ejectment, brought by William Dothard against L. P. Denson and others, to recover designated portions of the west half of section six, township seventeen, range eleven, east ; and was commenced on 17th July, 1877. The defendants jointly pleaded "not guilty, and the statutes of limitations of ten and twenty years ;" and on issue joined on these pleas the cause was tried, the trial resulting in a verdict and judgment for the defendants.

The opinion sufficiently indicates the facts disclosed by the record necessary to an understanding of the points decided.

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JNO. T. HEFLIN and AIKEN &amp; MARTIN, for appellant.

SMITH & SMITH, *contra*.

SOMERVILLE, J.—Adverse possession of land, without color of title, is limited to actual occupancy, and hence, the rule does not apply, in such cases, that the possession of part of a tract will be regarded as constructive possession of the whole. *Farley v. Smith*, 39 Ala. 38; *Bell v. Denson*, 56 Ala. 444. The latter principle applies only where the party in possession holds under some written instrument, or color of title, describing the boundaries of the land claimed.—*Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232; 2 Smith's Lead. Cases, 565.

The court properly excluded evidence of plaintiff's possession of parts of the tract sued for, other than of those parts claimed by the defendants, prior to the time when the plaintiff held under color of title.

It is true that the claim of a mere easement, or other right in land less than the entire fee, does not confer any adverse right to the fee simple, and that to have this effect, under the statute of limitations, "the claim must be of the entire title, exclusive of the title of any other person."—*N. O. & S. R. R. Co. v. Jones*, 68 Ala. 48, 55. If the defendant, Denson, had purchased a mere miner's right to dig gold, and had confined his claim of title only to this right, the foregoing principle would find application to the present case. The second charge requested by the plaintiff was properly refused, however, because it excluded from the consideration of the jury the fact that the claim of the defendant, Denson, was to the entire title, and was not confined to the mere right of mining on the land in controversy.

The other rulings of the court we need not discuss. They are settled to be correct in the opinions heretofore rendered in this cause on former appeals.—*Dothard v. Denson*, 72 Ala. 541; *Bell v. Denson*, 56 Ala. 444.

Judgment affirmed.

## McLeod v. McLeod.

### *Action for Malicious Prosecution.*

1. *Alias warrant of arrest; clerk of county court may issue.*—An alias warrant of arrest, not being a judicial act, may be issued by the clerk of the county court.

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2. *Same ; when defect in amendable.*—A variance between the original warrant of arrest charging the offense of trespass after warning, which follows the affidavit, and an *alias* subsequently issued, in the christian name of the owner of the lands on which the trespass is charged, is a mere clerical error, which may be corrected by the affidavit and original warrant.

3. *Same ; duty of court to issue ; admissible evidence in action for malicious prosecution.*—A warrant of arrest issued on affidavit by the county court having been returned not executed, it is the duty of the court, of its own motion, to issue an *alias*, that the defendant may be brought to trial and the prosecution ended ; and in an action for malicious prosecution by the accused against the prosecutor, the latter can not object to the *alias* as evidence, on the ground that it was issued without his request.

4. *Action for malicious prosecution ; when evidence of age of plaintiff inadmissible.*—In an action for a malicious prosecution for the offense of trespass after warning, it is not permissible for the plaintiff to prove that she is a very old person.

5. *Same ; probable cause.*—Probable cause not depending on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting, a want thereof can not be inferred from a failure or abandonment of the prosecution ; but the fact that the prosecution was abandoned should be weighed by the jury, in connection with the other circumstances of the case, in determining whether, at the institution of the prosecution, there was probable cause for believing the accused was guilty of the offense charged.

6. *Same ; when probable cause a question of law.*—The facts being undisputed, probable cause *vel non* is a question of law.

#### APPEAL from Crenshaw Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

As originally brought, this was an action by Margaret, Mack and Alexander McLeod against Hugh McLeod, to recover damages for an alleged malicious prosecution of the plaintiffs by the defendant for the offense of trespass after warning. The cause was before this court at a former term, when it was remanded on a reversal of the judgment of the circuit court. See *McLeod v. McLeod*, 73 Ala. 42. After remandment, the complaint was amended by striking out the names of Mack and Alexander McLeod as parties plaintiff, and the suit was afterwards prosecuted in the name of Margaret McLeod alone. The trial was had on issue joined on the plea of not guilty, resulting in a verdict and judgment for the plaintiff.

As shown by the evidence embodied in the bill of exceptions, the defendant, in April, 1881, made an affidavit before the judge of the county court of said county, charging the original plaintiffs with trespass after warning, on which a warrant of arrest was issued by said judge. This warrant was returned not served by the sheriff on 25th April, 1881 ; and on 11th May, 1881, the clerk of the county court, in the name of the judge, issued an *alias* warrant, under which the arrest was made. When the *alias* was issued, the defendant was not present, and did not request its issuance. It is recited in the



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bill of exceptions that "the records of the county court failed to show any order for an *alias* warrant." Objection was made to the introduction in evidence of the *alias* warrant, the grounds of which are sufficiently indicated in the opinion. The objection was overruled, the paper read in evidence, and the defendant excepted. The prosecution having been continued at first term, at the next term thereafter a *nolle prosequi* was entered on motion of the prosecutor.

The plaintiff was allowed to prove, against the defendant's objection, that she was about seventy-three years of age; and to this ruling the defendant excepted. The defendant also reserved an exception to the charge given by the court and copied in the opinion. Other facts were in evidence, and other exceptions were reserved, which the opinion does not render necessary to be stated in this report.

The rulings above noted are among the assignments of error here made.

JOHN GAMBLE, for appellant.

Name of appellee's counsel not disclosed by the record.

STONE, J.—Judges of the county court have authority to employ clerks, "who may do all acts not judicial in their character."—Code of 1876, § 721. The mere issuance of an *alias* warrant of arrest is not a judicial act, and may be done by a clerk of the county court.—*Seawright v. Halso*, 65 Ala. 431.

The original warrant, pursuing the affidavit, commanded the arrest of Margaret McLeod, for an alleged trespass after warning on the lands of *Leony* McLeod. The *alias* charged the trespass as committed on the lands of *Leroy* McLeod. This was a mere clerical error, which could be corrected, alike by the affidavit, and by the original warrant. There was no error in admitting it in evidence.

It was objected that the *alias* warrant of arrest was issued without the request of Hugh McLeod, who had made the affidavit, and sued out the original warrant. On this ground it is urged that the *alias* was improperly received in evidence in this cause. We can not agree to this. When the affidavit was made, charging Mrs. McLeod with the commission of the offense, this was the institution of a prosecution, and furnished authority to the judge of the county court to issue the warrant therefor, without other request. In fact, it became his duty to do so. That affidavit was made, and the warrant sued out April 22d, returnable April 25th. The original was not served, and was so returned. It was then the duty of the court to

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issue an *alias*, that the defendant might be brought to trial, and the prosecution ended. The *alias* was issued May 11th. The defendant can not complain of this, unless, before the issuance of the *alias*, he had procured a *nolle prosequi* of the proceeding, with the permission of the court. One or the other of these courses was necessary to put an end to the prosecution.

We will not say there might not be cases in which the extreme youth of a person charged with an offense, or, perhaps, with a tort, may be considered, in determining the question and degree of guilt. Capacity to commit crime, or to commit a tort, may certainly become a pertinent inquiry. But it is not permissible, in such an action as this, to prove that the person alleged to have been maliciously prosecuted, is a very old person. Old persons can commit trespasses after warning, as well as younger ones. There may be offenses which very old persons—old females particularly—would be scarcely capable of committing; and, hence, there might be issues in which such inquiry would be legal and pertinent. This is not one of them. The only influence such testimony could exert in this case, was an improper one, and it should not have been admitted.—*Motes v. Bates*, 74 Ala. 374.

To maintain an action for a malicious prosecution, three facts must be shown; that it was instituted without probable cause, that it was malicious, and that it has been determined. The proof of each of these facts rests with the plaintiff. Malice may be inferred from the want of probable cause for setting the prosecution on foot. Can the want of probable cause be inferred from a failure or abandonment of the prosecution? To hold that the final result of a trial in chief shall determine the right to make the arrest, would render criminal prosecutions very perilous; so perilous that few would be found to undertake them. The question in such cases is not whether the accused was in fact guilty, but whether the prosecutor, acting in good faith, and on the reasonable appearance of things, entertained the reasonable belief of his guilt. As said in *James v. Phelps*, 11 Ad. & El. 489, probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting. *Stone v. Crocker*, 24 Pick. 81; *Scott v. Simpson*, 1 Sandf. S. C. 601. Nor is it conclusive, or even *prima facie* evidence of a want of probable cause, that the prosecutor, after setting the prosecution on foot, afterwards abandoned it, or permitted a *nolle prosequi* to be entered.—*Purcell v. McNamara*, 1 Camp. 199; s. c. 9 East, 361; *Roberts v. Bayles*, 1 Sandf. S. C. 47. This doctrine rests on the obvious principle, sanctioned alike by reason and authority, that the prosecutor, at the

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institution of the proceedings, may have the honest and reasonable conviction of the existence of criminating facts and circumstances, which amount to probable cause for believing the accused guilty. Such criminating facts and circumstances, if acted on in good faith, constitute, in law, a complete defense, although it may afterwards turn out the accused was innocent. Cases are not infrequent, in which circumstances of suspicion point to a supposed offender, so strong in their character, as to amount to probable cause; and subsequent disclosures prove satisfactorily that the imputation was in fact groundless. Such disclosure would justify and demand an abandonment of the prosecution; and the abandonment would not make a *prima facie* case of want of probable cause. So, prosecutions are sometimes abandoned, because necessary testimony, once existing, is no longer obtainable.—2 Greenl. on Ev. (14th Ed.) § 455, and notes.

It is not to be inferred from what we have said, that the act of abandoning a prosecution is not evidence to be weighed by the jury. That, and all other circumstances, should be considered in determining whether, at the institution of the prosecution, there was probable cause for believing the accused was guilty of the offense charged.—4 Wait's Ac. & Def. 342; 2 Brick. Dig. 236, §§ 1, 2, 3, 4. And the facts being undisputed, probable cause *vel non*, is a question of law.—*Ewing v. Sandford*, 19 Ala. 605.

The court charged the jury "that if they believed from the evidence that the prosecution was nol-prossed at the instance of defendant, and no explanation was given for so doing, this would be *prima facie* evidence of a want of probable cause." In this the circuit court erred.

There is nothing in any of the other objections urged.  
Reversed and remanded.

## Vandegrift, Adm'r, v. Abbott.

### *Action on Promissory Note.*

1. *Rent of decedent's lands; when contract for repairs binding on administrator.*—An administrator having, under the statute, the power to rent the lands of his intestate, this power and the duty to rent resulting therefrom authorize him to make such repairs as are necessary to render the lands tenantable; and if, even in the absence of such power, an administrator should stipulate with the tenant for making repairs, he could not avoid the stipulation, and whoever claimed its enforcement would take it *cum onere*.



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2. *Rent of lands; right of tenant to recoup damages resulting from failure to repair.*—In an action against a tenant for the recovery of rent, if he is entitled to damages in consequence of the failure of the landlord to repair according to a covenant in the lease, or in an agreement made at the time of the contract of renting, he may recoup the damages by way of reducing or extinguishing the rent.

3. *Contract partly in writing and partly in parol; admissibility of parol evidence.*—If a statute does not intervene, contracts may be expressed partly in writing, and partly in parol; and if the writing does not purport to set out the entire contract, but only the part thereof which is obligatory on the party making it, parol evidence is admissible to establish a distinct and separable part of the contract, obligatory on the other party, but not reduced to writing. (*Evans v. Bell*, 20 Ala. 509, overruled on this point.)

4. *Same.*—Hence, where only the promise of a tenant to pay rent is reduced to writing, parol evidence is admissible to establish a distinct and separable contract on the part of the landlord to repair, made contemporaneously with the writing.

5. *Agreement to repair; measure of damages.*—When a landlord stipulates to make repairs, and fails to do so, it is not the duty of the tenant to cause the repairs to be made, limiting his recovery to the expenses thereby incurred; but he has the right to rely upon the landlord's promise to make them, and for a breach of the promise, the landlord is liable for such damages as are the natural and proximate result.

#### APPEAL from St. Clair Circuit Court.

Tried before JOHN HENDERSON, Esquire, Special Judge.

This was an action on a promissory note, brought by James R. Vandegrift, as the administrator of the estate of John J. Abbott, deceased, against W. R. Abbott, J. W. Casper and J. B. Robinson, the makers of the note. The defendants pleaded, among other things, the following plea: "That the plaintiff, as the administrator of the estate of the said John J. Abbott, deceased, rented at public outcry the lands belonging to said estate, and that, at said renting, the plaintiff, as such administrator, promised and agreed to repair the fence around said land so rented, so as to secure the crop raised on said land for said year 1878; and that said plaintiff failed and refused to repair said fence. Whereby said defendants sustained great damage, to-wit, two hundred dollars, by stock breaking into, and destroying said crop." The plaintiff demurred to the plea, on the ground that the matter set up therein was an individual liability of the plaintiff, "and, as such, could not be set off" against the note sued on. The court overruled the demurrer, and the cause was tried on issues joined on this and other pleas, the trial resulting in a verdict and judgment for the defendant.

After the plaintiff had read the note sued on to the jury, the defendant Abbott was examined as a witness on behalf of the defendants, and testified that the plaintiff, as such administrator, on 10th October, 1877, after due notice, offered "to rent, at public outcry, to the highest bidder a portion of the lands

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of said estate, but having obtained only a few bids, stopped before any bid was accepted; that it was suggested to the administrator to agree to fix up the fence in good condition, in order to obtain more and better bids; and thereupon the administrator agreed to fix up the fence around said lands so to be rented, by 1st February, 1878, sufficiently to protect the crops, and then proceeded to offer said lands for rent; that witness bid off for rent about forty-five acres at the sum of \$66.50, for which sum he, with the other defendants, afterwards, but on said day, executed the note sued on in this case; and that witness took possession of, and cultivated said land, and, in consequence of plaintiff's failure to repair said fence, stock broke into, and destroyed a large portion of his crop, to-wit, two hundred and ten dollars worth." The plaintiff offered to prove by said witness, that he, the witness, "could have fixed the fence around the premises so rented by him in due time, if he would have done so; that witness had the time to do this, and, by so doing, he could and would have prevented damages to his crop on said rented premises by stock breaking in. But the court refused to allow the offered proof to be made," and the plaintiff excepted.

The foregoing being the substance of all the evidence introduced on the trial, the court charged the jury, *ex mero motu*, "that if the evidence shows that stock broke into the fields the plaintiff rented to defendant, and injured and destroyed his crop, and that plaintiff agreed and contracted to repair the fence, and failed to do so, and that this breaking and injury resulted from plaintiff's failure to repair the fence, as he had contracted to do, and that the damage thus resulting to defendant was as much as, or more than plaintiff's note, plaintiff can not recover." To this charge the plaintiff duly excepted, and also to the refusal of the court to give the following, among other charges, requested by him in writing: 1. "If the jury believe the evidence in this case, they must find for the plaintiff." 2. "If the jury believe from the evidence, that the note sued on in this case was executed after the land was rented, for which the note was given, the note should disclose whether or not the plaintiff was to make repairs on the premises so rented; and oral evidence can not be allowed to contradict such note." 3. "All previous and parol agreements are merged into a written agreement subsequently entered into by the parties; and such written agreement is the sole expounder of the agreement."

The rulings above noted are here assigned as error.

JAMES R. VANDEGRIFT, for appellant.

[Vandegrift, Adm'r, v. Abbott.]

JOHN W. INZER, *contra*.

BRICKELL, C. J.—1. An administrator has by statute the power, and the power comprehends the duty of renting the lands of the intestate.—Code of 1876, § 2446. The power and duty will authorize him to make such repairs as are necessary to render the lands tenantable; otherwise it will be incapable of just and prudent exercise. But if the argument of the counsel for the appellant were conceded, and, without authority, upon renting the lands, an administrator should stipulate with the tenant for the making of repairs, he could not avoid the stipulation; it would be binding upon him, would inhere to the contract of renting, and whoever claimed its enforcement would take it *cum onere*. As a general rule, a trustee can not avoid his contracts, or nullify his acts, because they may be in violation of the trust, or an excess or abuse of the authority with which he is invested.—*Stoudemeir v. Williamson*, 29 Ala. 558; *Farrow v. Bragg*, 30 Ala. 261; *Riddle v. Hill*, 51 Ala. 224.

2. It has been repeatedly decided that, in an action against a tenant for the recovery of rent, if he is entitled to damages in consequence of the failure of the landlord to repair according to a covenant in the lease, or an agreement made at the time of the contract of renting, he may recoup the damages by way of reducing or extinguishing the rent.—*Waterman on Set-Off*, 580; *Culver v. Hill*, 68 Ala. 66; *Westlake v. DeGraw*, 25 Wend. 669. It is not, as is argued by the counsel for the appellant, a question of set-off. The two demands spring out of the same transaction, and there is a natural equity that the one should compensate the other, and that only the balance should be recoverable.—*Hatchett v. Gibson*, 13 Ala. 587; *Batterman v. Pierce*, 3 Hill (N. Y.), 171.

3. The admission of parol evidence of the agreement of the landlord to repair did not offend the general rule, that parol evidence is inadmissible to vary or contradict a contract in writing. The contract in writing was the promise of the tenant to pay the rent; the agreement of the landlord to repair was a distinct and separable contract, though made contemporaneously. Contracts, if a statute does not intervene, may be expressed partly in writing, and partly in parol. If the writing does not purport to set out the entire contract, if it purports to set out only the part of the contract which is obligatory on the party making it, there is no just objection to parol evidence of the distinct and separable part of the contract, not reduced to writing, obligatory upon the other party.—2 Whart. Ev. § 1015; *Garrow v. Carpenter*, 1 Port. 359; *Brown v. Isbell*, 11 Ala. 1009; *Patton v. Beecher*, 62 Ala. 585; *Huckabee v. Sheppard*,



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[*ante*, p. 342]. The case of *Evans v. Bell*, 20 Ala. 509, asserting a contrary doctrine, is erroneous.

4. It was not the duty of the tenant to cause the repairs to have been made, limiting his recovery to the expenses thereby incurred. He had the right to rely upon the promise of the appellant to make them, and for a breach of the promise the appellant is liable for such damages as were the natural and proximate result.—*Culver v. Hill*, 68 Ala. 66.

Affirmed.

## McAllilley *et al.* v. Horton *et al.*

### *Application for Authority to erect Mill-Dam.*

1. *Common law writ of certiorari ; its functions and office.*—The functions of the common law writ of *certiorari* extend alike to questions touching the jurisdiction of the subordinate tribunal, and the regularity of its proceedings ; and by it errors of law, apparent on the face of the record, may be corrected, but, in the absence of statutory authority, conclusions of fact can not be reviewed.

2. *Same ; tried on the record.*—In such case, the trial is not *de novo*, but on the record ; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review.

3. *Erection of mill-dams ; jurisdiction of probate court.*—The jurisdiction of the probate court touching the erection of dams for mills, etc., being special and limited, the record must affirmatively show a full and substantial compliance with all the requirements of the statute.

4. *Same ; inquest of jury.*—In such case, the inquest of the jury is sufficient if it is clearly responsive to all the matters which the statute requires the jury to investigate ; but any finding of the jury which falls short of this requirement, is defective, and will authorize, on motion of any party to the record, the entire proceedings to be vacated or quashed.

5. *Same ; oath to jury.*—Where the recital of the inquest is, that the jury, before proceeding to their investigation, were "first duly sworn and charged by said sheriff as required by law," and the return of the sheriff shows that the jury were sworn and charged by him in the precise language of the statute, this sufficiently shows that the jury were sworn as required by the statute.

6. *Same ; sufficiency of inquest.*—Where the jury, after being charged by the sheriff according to the exact requirements of the statute, find that "no land, above or below the proposed site of the dam, will be damaged more than by the natural overflow of the creek on which the dam is to be built," this is sufficient to negative the idea that either the residences of the owners of such lands, or the outhouses, enclosures, gardens or orchards thereon would be injured by the overflow resulting from the erection of the dam.

APPEAL from Greene Circuit Court.

Tried before Hon. S. H. SPROTT.

[McAllilley v. Horton.]

The facts are sufficiently stated in the opinion.

WM. P. WEBB, for appellants.

JAMES B. HEAD, *contra*.

SOMERVILLE, J.—The present appeal is from a judgment of the circuit court quashing a writ of *certiorari*, which had been granted by the judge of that court for the purpose of reviewing the regularity of certain *ad quod damnum* proceedings in the probate court of Greene county. The design of these proceedings was to authorize the erection of a mill-dam under the provisions of the statute, as embraced in sections 3555–3579 of the present Code, of 1876.

The appellants became parties in the mode prescribed by section 3576, which required them to make, for this purpose, an affidavit that they were *interested*, and to give security for the costs.

In the case of the *Town of Camden v. Bloch*, 65 Ala. 236, in discussing the functions of the *common-law* writ of *certiorari*, we observed, that it extended alike to questions touching the *jurisdiction* of the subordinate tribunal, and the *regularity* of its proceedings. “The appropriate office of the writ,” we further added, “is to correct errors of *law*, apparent on the face of the record. Conclusions of *fact* can not be reviewed, unless specially authorized by the statute. The trial is not *de novo*, but on the record; and *the only matter to be determined is, the QUASHING or the AFFIRMATION of the proceedings brought up for review.*”

The objection of the appellants is, that the circuit court erred in quashing the writ of *certiorari* itself, instead of quashing the proceedings *ad quod damnum*, which, it is insisted, presented errors of law apparent upon the face of the record.

The jurisdiction conferred on the probate court in matters of this character has often been held to be special and limited, and the rule is well settled that the record must, in all such cases, affirmatively show a full and substantial compliance with all the requirements of the statute. Section 3564 of the Code specifies what particular matters of inquiry are to be investigated by the jury, after they have been sworn and charged by the sheriff, who is required to attend with the jury at the place where the dam is proposed to be erected. All of these several matters of inquiry we need not here reiterate. The record shows that the jury were accurately charged by the sheriff in reference to each of these duties.

We understand it to be settled by the past decisions of this  
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court, that it is sufficient, so far as concerns *the inquest of the jury*, if it is clearly responsive to all of these matters which the statute requires the jury to investigate. Any finding of the jury, which falls short of this requirement, is defective, and would authorize the entire proceedings to be vacated, or quashed, on motion of any party to the record.—*Martin v. Rushton*, 42 Ala. 289; *Owen v. Jordan*, 27 Ala. 608.

It is contended that the probate court proceedings were defective in failing to show that the jury were sworn "to discharge their duties fairly to the best of their ability," as required by the statute.—Code, § 3564. The recital of the *inquest* is, that the jury, before proceeding to their investigation, were "first *duly sworn and charged* by said sheriff *as required by law*." In addition to this, the *return* of the sheriff shows that the jury were sworn and charged by him in the precise language prescribed by the statute. This, in our opinion, was sufficient, and the identical question was so decided in *Rushton v. Martin*, 43 Ala. 555.

It is further insisted that the record fails to show that the jury examined "*the land above and below*, belonging to others," which would probably be overflowed or injured, with the view of assessing the damages resulting from the erection of the dam; or to ascertain if "*the residence*," or "*outhouses, enclosures, gardens, or orchards*," of the owner of such lands would be overflowed.—Code, § 3564.

The inquest of the jury makes reference to the "charge" given them by the sheriff, which is the only chart of their duties under the law, and the two must obviously be construed together, each constituting a part of the record, and of the *ad quod damnum* proceedings. It is certified that the jury met at the place for erecting the dam, specified in the application, "to inquire touching the matters contained in said application," and after having been properly sworn, that "they proceeded and made *the examination and inquiries* in a thorough and impartial and legal manner; and do find that *NO LAND, above or below* the proposed site of said dam, will be damaged more than by the natural overflow of said creek on which the dam is to be built." The charge of the sheriff, as we have said, follows the exact requirements of the statute in every particular. It is sufficiently apparent that the examination made by the jury was the one enjoined upon them by the sheriff, especially in view of the averment of the inquest that "*no land, above or below*" the proposed site of the dam will be damaged more than to a certain extent designated. This is broad enough to negative the idea that either the residence of the owner of such lands, or the outhouses, enclosures, gardens, or orchards, would be injured by overflow. These appurtenances were all



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parts of the realty, and are included in the designation of *land*, which is *nomen generalissimum*. If the erection of the dam created no artificial overflow on any lands, above or below, no damage could result to any appurtenances of the soil.

We construe the inquest to assert that the erection proposed will not produce any artificial overflow, and that the only damage likely to accrue is that produced by the "natural overflow" of the creek—by which we understand the overflow which was accustomed to happen in the due course of nature, unaffected by any artificial influences.

We have reached these conclusions without any reference to the amended return of the sheriff, or second inquest of the jury, which it is needless that we should notice.

The judgment of the circuit court quashing the writ is free from error, and is affirmed.

## Beadle v. Davidson and Wife.

### *Motion for Re-Taxation of Costs.*

1. *Presumption in favor of judgment of primary court.*—On appeal, the judgments of primary courts must be presumed to be free from error, until the contrary is shown.

2. *Same ; when judgment overruling motion to re-tax costs will not be disturbed.*—Where, on appeal from a judgment of the circuit court overruling a motion made by the plaintiff for a re-taxation of the costs, so as to include the fees of a witness examined on behalf of the plaintiff, whose fees the clerk had omitted to tax against the defendant, the bill of exceptions fails to show how many witnesses were examined on behalf of the plaintiff, and does not repel the conclusion, that many other witnesses were so examined, this court will presume, in favor of the judgment of the circuit court, that the action of that court, in overruling the motion, was based on the fact, that the fees of two other witnesses, testifying to the same fact, had already been allowed.

APPEAL from Madison Circuit Court.

Tried before Hon. H. C. SPEAKE.

This was a motion by the plaintiff in the court below, appellant here, to re-tax the costs against the defendants, so as to include the fees of one Strode, one of the plaintiff's witnesses on the trial of said cause, to whom certificates had been issued, but whose fees the clerk had failed to tax. The motion was overruled, and the plaintiff excepted ; and that ruling is here assigned as error.

HUMES, GORDON & SHEFFEY, for appellant.

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[Whetstone, per pro ami, v. Whetstone's Ex'rs.]

WALKER & WALKER and D. D. SHELBY, *contra*.

SOMERVILLE, J.—The present appeal is taken from a judgment of the circuit court dismissing a motion made by the appellant for the re-taxation of certain costs. There is nothing in the record showing the ground upon which this action of the court was based. It may have been for the reason, that two other witnesses, besides the witness Strode, had been examined in the same cause, to prove the same matters of fact, and that costs had already been allowed for these witnesses. If this were true, the motion was properly disallowed, in view of the statutory provision, that “not more than *two witnesses* shall be taxed in any bill of costs, who were called to prove any one matter of fact.”—Code, 1876, § 3144. The bill of exceptions fails to show how many witnesses were examined; nor does it repel the conclusion that many others were examined, besides the one in whose behalf the present motion seems to have been made.

The judgments of *nisi-prius* courts must be presumed to be free from error, when assailed on appeal, until the contrary is shown. To repel the presumption, the appellant, in our opinion, should have made it appear, by affirmative proof, that no allowance for costs had been made by the circuit court in behalf of two other witnesses who may have been summoned and examined to prove the same matters of fact proved by the witness Strode.

Affirmed.

## Whetstone, *per pro ami*, v. Whetstone's Ex'rs.

### *Bill in Equity for Settlement of Trust.*

1. *Person non compos mentis; right to sue by next friend.*—A person *non compos mentis* may sue by next friend, before and without an inquisition of lunacy; but a mere volunteer who institutes a suit as next friend of a *con compos*, before there has been an inquisition of lunacy, always proceeds at his peril; peril, that the alleged *non compos* may not in fact be so, or may recover and repudiate his interference; or that the chancery court may not consider him a suitable person, and may disallow his intermeddling.

2. *Same; statute 17 Edward 2.*—The statute of 17 Edward 2, Ch. 10 and 19, conferring on the king, as *parens patrie*, power to take care of the property of lunatics and idiots, though enacted before the settle-

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ment, or even the discovery, of this country, being inconsistent with our institutions and form of government, is not of force with us.

3. *Same; equity of bill in equity by next friend; how determined.*—The equity of a bill filed by a *non compos mentis*, suing by a next friend, before and without an inquisition of lunacy, must be determined on its averments, independent of the state of the complainant's mind, and as if she were of sane mind, suing by herself, and in her own right.

4. *Same; jurisdiction of court of equity to enforce settlement by agent or trustee.*—Where a brother voluntarily assumed the relation of agent and trustee for his sister, a *non compos mentis*, without an inquisition of lunacy, and continued in the management of her estate, receiving the rents, income and profits, and paying her personal expenses, a court of equity, upon his death, will entertain a bill against his executor, in favor of the sister, she suing by next friend, to compel a settlement of the trust.

5. *Same; control of court over next friend.*—When a bill is filed by a next friend for a *non compos mentis*, who has not been so adjudged, the welfare and interest of the *non compos*, being matters of prime, dominating importance, should receive the careful consideration of the court, before the litigation is allowed to progress. These preliminary inquiries should be first instituted, and, to this end, the chancellor may require the verdict of a jury, or a report from the register, so as to properly inform his conscience; and if the suit is successful, its proceeds should not be allowed to pass into unsafe hands.

6. *Same.*—Should there be a successful inquisition, and a guardian should be appointed, pending the litigation, an inquiry should be instituted whether such appointment is in the interest of the *non compos*; and if this inquiry prove satisfactory, such guardian should be allowed to control the litigation.

7. *Continuing trust; when time does not run against.*—When there is a continuing trust, with active duties required of, and performed by the trustee, the case is analogous to a running, mutual account, and time does not run against it; but each act done under, or in recognition of the trust, is a renewal of the obligation it imposes.

APPEAL from Autanga Chancery Court.

Heard before Hon. N. S. GRAHAM.

The case made by the bill in this cause, and the relief sought thereby are sufficiently stated in the opinion. The defendants demurred to the bill, assigning the following, among other grounds of demurrer: (1) That the complainant had a full and adequate remedy at law. (2) That it is not averred that Rachel D. Whetstone has ever been declared to be a person of unsound mind, and incapable of attending to her own affairs. (3) That no facts are set forth in the bill authorizing Henry L. Stone and Daniel H. DeBardeleben to file the bill in this cause in the name of the said Rachel D. Whetstone. (4) "That it is not shown that the said complainant, Rachel D. Whetstone, has commenced this suit, but that the said Henry L. Stone and Daniel H. De Bardeleben, of their own motion, and without the consent of the said Rachel, have filed this bill." (5) That the bill does not show that the said Lewis M. Whetstone ever became the trustee of the said Rachel. (6) That the facts and circumstances alleged in the bill show that simply the



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relation of principal and agent existed between the said Rachel D. and the said Lewis M. Whetstone; and that no facts are averred, showing any complication of the accounts between them, or other cause, making it necessary to resort to a court of equity for a settlement of the same. (7) That it appears from the bill, that the complainant's claim is barred by the statute of limitations. (8) That it appears from the bill, that said claim is a stale demand, and is barred by the lapse of time.

On a submission of the cause on demurrer, the chancellor was of the opinion that the complainant's claim was a stale demand, and he caused a decree to be entered sustaining the demurrer on that ground; and that decree is here assigned as error.

GUNTER & BLAKEY, for appellants.

THOS. W. SADLER and WATTS & SON, *contra*.

STONE, J.—The present bill was filed June 14th, 1882, by Rachel D. Whetstone, suing by her next friends, Henry L. Stone and Daniel H. De Bardeleben, against the executors of Lewis M. Whetstone. It avers that the said Rachel D. "has been all her life a person of weak mind and understanding, and has never undertaken to transact any business affairs, or to manage property; and since the year 1860, has been entirely incapable of making or understanding any business transactions, from mental derangement." The bill further alleges that the said Rachel D. and the late Lewis M. Whetstone are daughter and son of Henry Whetstone, who died about the year 1835, leaving a will, of which Lewis M. was executor, and acted as such. That the said Lewis M. settled up the estate of his father about the year 1843, and the said Rachel D., a legatee under said will, acquired thereunder money and other personal property, the amount of which is charged in the bill. The bill further charges that about the year 1844, Daniel J. Whetstone, a brother of Rachel and Lewis, died, and that said Rachel, as distributee, thereby became the owner of other personalty of specified value. The bill then avers that complainant's "condition, on the death of her father, and on the settlement of his estate, was fully known and recognized by all her family, and in consequence thereof her said brother, Lewis M. Whetstone, assumed, with her consent, to receive, hold and manage her estate and property for her, as her agent and trustee, and, in that capacity, received and held all her share of her father's estate," and also her share of her deceased brother's estate. The bill then charges, "that the said Lewis M. Whetstone never denied his trusteeship, and, up to the year 1878, when he lost his own mind, continuously admitted that he was

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such trustee of complainant, and held himself out to the world as her agent and trustee; and continued to act as oratrix's agent and trustee, and to hold oratrix's estate, and to receive the interest and accumulations therefrom, and as such trustee to disburse small sums, as needed for her use, until the said Lewis M. Whetstone lost his own mind, about the year 1878.

That from the death of her father to about the year 1870, oratrix lived in the family of one of her sisters, and her annual expenditures of money did not, in every thing, exceed the sum of seventy-five or one hundred dollars; and since that time her expenditures have not been more than one hundred to one hundred and fifty dollars per annum; and that the income of her estate has been greatly more than that. That she has never received, nor has any one for her received any part of her estate from her said trustee, L. M. Whetstone, from the death of her father to this date, except the small sums annually expended for her support, herein above mentioned." The bill shows that the said Rachel D. has never been declared a lunatic, or *non compos mentis*, by any judicial proceeding; and, as a necessary consequence, no guardian was, or could have been appointed for her.—Code of 1876, §§ 2753, 2757, *et seq.* The prayer of the bill is, to bring the executors of Lewis M. Whetstone to a settlement of the alleged trust, on which it is charged there is a large sum—thirty thousand dollars—due and unpaid. The defendants demurred to the bill, assigning several grounds. Such of them as present questions deemed by us to be important, we will proceed to consider, without reference to their numbers, or the order in which they are presented.

Were the persons who appear as next friends, authorized to institute this suit, and could they sue in equity?

The statute 17 Edward the second, enacted more than five centuries ago, in chapters 10 and 19, conferred on the king, as *parens patriæ*, power to take care of the property of lunatics and idiots; as to the former, as a mere trust; as to the latter, as a trust coupled with an interest. It was said, however, in *Beverley's case*, 4 Rep. 126, that this statute was simply declaratory of the common law. Speaking of this power and its exercise, Lord Chancellor Redesdale, *In the Matter of Fitzgerald, a Lunatic*, 2 Sch. & Lef. 432, said: "The duty thus thrown on the crown was often difficult; it was to be performed by the crown, according to the advice upon which the king might constitutionally act, and it has therefore long been the practice, from time to time, to authorize by the king's sign manual the person holding the great seal to exercise the discretion of the crown in providing for the care and custody of persons and estates of lunatics, which has usually been done

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by grants to committees. But I apprehend that though the discretion of the crown has thus been delegated to the person holding the great seal, yet the superintendence of the conduct of the committee, in the management both of the property and the person, originates in the authority of the court itself, as the court from which the commission inquiring of the lunacy issues, and into which the inquisition is returned, and which makes the grant founded on the inquisition. . . . But as the king is bound in conscience to execute the trust reposed in him by the statute, and can not do it otherwise than by bailiff, the chancellor, or person holding the great seal, is the proper authority to direct and control the authority of the person so appointed bailiff."

In *Jones v. Lloyd*, 18 Equity Cases, 265, the Master of the Rolls, after declaring the rights of the lunatic in the case, said: "That, then, being his right, can it be exercised? That is, can a suit be instituted by the lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct that I have no occasion to refer to the reason; for I think the cases of *Light v. Light*, 25 Beav. 248, and *Beall v. Smith*, Law Rep. 9 Chan. App. Ca. 85, are such authorities." The M. R., however, gives the reasons, and very forcible ones. After stating them, he adds: "I take it, these propositions, when stated, really furnish a complete answer to the suggestion that he can not maintain such a suit. Of course, they do not answer the question as to how far he may carry it; but that he can maintain such a suit for protection, . . . I should think there can be no doubt whatever." And in *Beall v. Smith*, 9 Chan. App. Ca. 85, it was said that "every person so constituting himself officiously the guardian, committee and protector of a person of unsound mind does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings, if they are called in question, and to bear the consequences of any unnecessary and improper proceedings. He takes the risk, moreover, of having his proceedings wholly repudiated by the lunatic, if he should recover his reason, just as the next friend of an infant runs the risk of having his proceedings wholly repudiated, on the infant attaining his full age." We do not doubt that, under limitations hereafter stated, a person *non compos mentis* may sue by next friend, before and without inquisition of lunacy.

The English statute 17 Edward II does not, of itself, constitute idiots and lunatics wards of the chancery court, as infants are. Nor does the king's sign manual constitute them such. Such process is issued to the keeper of the great seal, and not to the court of chancery. It constitutes him (the



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chancellor) representative of the king, to execute the trust, which the statute casts on the crown. It is a personal confidence reposed in the Lord Chancellor, the keeper of the great seal, and not in the court of chancery. The custody of the persons and estates of *non compotes mentis* is not, without more, even in England, any part of the jurisdiction of the chancery court.—*Beall v. Smith*, 9 Chan. App. Ca. 85; *Jones v. Lloyd*, 18 L. R. Eq. Ca. 265. In the case last cited, it was said: "The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind." The statute 17 Edward II being older than the settlement, or even discovery of this country, it would be part of our common law, if adapted to our institutions. But it is not so adapted. The constitution and frame of our government forbid that we should give it force here. The question of the equity of this bill must, then, be determined on its averments, independently of the state of complainant's mind; in other words, as if she were of sane mind, suing by herself, and in her own right.

In *Fitzgerald's case*, 2 Sch. & Lef. 432, Lord Redesdale employed this language: "I apprehend that though the discretion of the crown has thus been delegated to the person holding the great seal, yet the superintendence of the conduct of the committee in the management both of the property and the person, originates in the authority of the court itself." *Vincent v. Rogers*, 30 Ala. 471, presented the case of a deposit of money in the hands of the latter, for the benefit of an infant, "to be kept for her use and benefit," with a stipulation by the depositary that he was to furnish her with clothing, schooling and other expenses which he might think necessary. There was suit at law on this contract, in favor of the beneficiary, alleging its non-payment to her. Defendant demurred to the complaint, and the circuit court sustained the demurrer. This court reversed the ruling, holding that the complaint made a *prima facie* case of indebtedness, which would maintain an action of *assumpsit*. It was added: "The nature and objects of the trust show, that the parties did not contemplate a present debt, or present right of action. The expenditures for Miss Vincent, which the contract confided to the discretion of Mr. Rogers, if he incurred any, were continuing in their character, and show that the parties intended to create, and did create a continuing trust. The duties of this trust, like those of a guardianship, would terminate with the minority of the beneficiary; and hence, we fix the maturity of this demand at the time when Miss Vincent attained to lawful age. This agreement, and proof that Miss Vincent had reached the years of maturity before she sued, and that she had demanded the money of defendant, made out a

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*prima facie* case for recovery. . . . If met as above indicated [that is, if Rogers expended moneys for Miss Vincent, under the discretion allowed him], the jurisdiction of the law court would have been ousted, and the defendant left to her remedy in chancery." In *Thornton v. Thornton*, 31 Gratt. 212, it was said: "In an agency, where there is a fiduciary relation between the parties, a court of equity has jurisdiction to settle and adjust the accounts between them." In *Moody v. Bibb*, 50 Ala. 245, this court said: "A person who assumes to act as the guardian of a lunatic without authority, or under an appointment of the probate court which is void for want of jurisdiction, may be charged as a trustee *in invitum*, and compelled to account in the chancery court."—*Corbitt v. Carroll*, *Ib.* 315; *Tanner v. Skinner*, 11 Bush (Ky.), 120; *Cole v. Cole*, 28 Gratt. 365; 3 Pom. Eq. § 1313; 2 Sto. Eq. Jur. § 1365c; *Bibb v. McKinley*, 9 Porter, 636.

According to the averments of the present bill, Lewis M. Whetstone assumed and continued the control and management of his sister's estate—she being a person of weak and imbecile mind—from the time she acquired it, until he himself became a *non compos*. During all this time, it is averred he acted in open recognition of his agency, and continually paid her necessary expenses of living. These offices are so nearly akin to those of a guardian duly appointed, that the jurisdiction of the chancery court to bring his executors to a settlement can not be questioned.

We have said that the right of a mere volunteer to institute a suit as next friend of a non-adjudged *non compos*, rests under limitations. He always proceeds at his peril; peril, that the alleged *non compos*, or lunatic, or person of weak and incapable mind, may not in fact be so, or may recover, and repudiate the interference; peril, that the chancery court may not consider him a suitable person, and may disallow his intermeddling. The welfare and interest of the alleged *non compos* are matters of prime, dominating importance, and should receive the careful consideration of the court, before the litigation is allowed to progress. These preliminary inquiries should be first instituted; and to this end the chancellor may require the verdict of a jury, or a report from the register, so as to properly inform his conscience. Nor should the proceeds of the suit, if successful, be allowed to pass into unsafe hands. Should there be a successful inquisition, and a guardian appointed pending the litigation, an inquiry should be instituted whether such appointment is in the interest of the *non compos*. If this inquiry prove satisfactory, then such guardian should be allowed to control the litigation. We will not now anticipate other emergencies that may arise.

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What we have said above is conclusive to show, that neither lapse of time nor the statute of limitations affects the questions raised by this bill. When there is a continuing trust, with active duties required of, and performed by the trustee, the case is analogous to a running, mutual account, and time does not run. Each act done under, or in recognition of the trust, is a renewal of the obligation it imposes.—Perry on Trusts, § 863, and note 1.

In one respect the present bill is scarcely sufficient. It should be averred as fact, and not left as an implication, that Lewis M. Whetstone paid, and continued to pay complainant's accruing, annual expenses.

Reversed and remanded.

## Carlisle v. May.

*Bill in Equity by Creditor having Execution from Probate Court to redeem Lands conveyed by Mortgage.*

1. *Lien of execution issued from probate court; when lost.*—While, under the statute, six months may be permitted to elapse between the issue and return of an execution from the probate court, a new execution must be issued before the lapse of the regular monthly term next succeeding the return term, or the lien of the execution will be lost.

2. *Same.*—Where an execution issued from the probate court, returnable on the second Monday in December, 1882, was in the hands of the sheriff at the time of the death of the defendant in execution, in September, 1882, but no other execution was issued until 21st April, 1883, four entire terms of the probate court having been thus allowed to elapse without the issue of an execution, this operated a loss of the lien.

APPEAL from City Court of Selma.

Heard before HON. JNO. HARALSON.

Bill in equity by Robert C. Carlisle and others, heirs at law of Robert Carlisle, deceased, against Moody H. May, Alfred Gardner, as the administrator of the estate of Andrew H. Gardner, deceased, and the widow and children of said decedent, and against Mary Ford; and the case made thereby is briefly as follows: In 1868, Robert Carlisle departed this life, intestate, in Dallas county, in this State, and, after an administration in chief, Moody H. May was, on 22d November, 1871, appointed administrator *de bonis non* of the estate of said decedent, and qualified as such by giving bond, and entered upon the discharge of the duties of said trust. In 1875, in obedience to an order duly entered by the probate court, said May



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executed an additional bond, as such administrator, with the said Andrew H. Gardner as one of his sureties. On 14th April, 1879, a final settlement of the administration of said May upon said estate was had in the probate court, when decrees were rendered against him in favor of the heirs of said Robert Carlisle, the complainants, each for the sum of \$1167.44, which have not been paid. Executions issued on said decrees against said May having been returned "no property found," executions were, on 22d October, 1879, issued against him and the sureties on his administration bond, including the said Andrew H. Gardner, and from time to time thereafter until 23d August, 1882, when an execution was issued against them on each of the decrees, returnable to the second Monday in December, 1882. On 29th September, 1882, Andrew H. Gardner departed this life, intestate, leaving a widow and minor children, who are made parties defendant to the bill, and thereafter the said Alfred Gardner was appointed administrator of his estate. After his death, on 21st April, 1883, executions were again issued on said decrees, returnable on second Monday in September, 1883, which were in the hands of the sheriff, and not levied, at the time the bill was filed. On 3d June, 1875, the said Andrew H. Gardner executed to the said Moody H. May, as trustee for the said Mary Ford, a mortgage on certain lands belonging to him, and situate in Dallas county, to secure a debt due on 1st October, 1875. It is averred that nearly all of this debt has been paid, and an offer is made to pay the balance. The bill contains other averments as to this mortgage, as to uncertainty of description of lands conveyed, and their identity with lands owned by said Gardner, which are not necessary to this report. The principal prayer of the bill is, that a discovery be had of the balance due on the debt secured by said mortgage, and that the complainants be allowed to redeem.

A demurrer was interposed by the defendants Ford and May, on the ground, in substance, that the complainants, at the time of filing their bill, as appears from its averments, had no lien on the lands sought to be redeemed; and, on a submission thereon, a decree was entered sustaining it. That decree is here assigned as error.

WHITE & WHITE, for appellants.

H. S. D. MALLORY and E. W. PETTUS, *contra*.

SOMERVILLE, J.—The question raised by the action of the court, sustaining the demurrer to the bill, is embraced in the inquiry, as to what constitutes "the lapse of an entire

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term," in the case of executions issued on judgments or decrees of the probate court, within the meaning of section 3210 of the present Code (1876).

It is provided by the latter section, that an execution is a lien, in the county within which it is received by the officer, on the lands and personal property of the defendant, subject to levy and sale, from the time when the writ comes into the hands of the sheriff, and continues only so long as it is "regularly issued and delivered to the sheriff *without the lapse of an entire term.*"—Code 1876, § 3210.

So, it is also provided that a writ of execution, which has been "issued and received by the sheriff during the life of the defendant, may be levied after his decease, or an *alias* issued and levied, if there has not been the *lapse of an entire term*, so as to destroy the lien originally created."—Code, 1876, § 3213.

The regular terms of the probate court are fixed by statute, and are required to be "held at the court-house of each county, on the second Monday in each month."—Code, 1876, § 701. All executions and other process, issuing from the court of probate, may be made returnable, if no other day is provided by law, to any regular term of such court, "not less than three nor more than six months after such issue," or to any special term within the same period.—Code, 1876, § 710.

It is contended that the phrase "entire term," as applicable to probate courts, must be construed to mean not more than *six months* after the last or preceding execution was made returnable. We are unable thus to construe the statutes on this subject, when all taken together, as importing such a meaning. An entire term means simply "from one session of the court to another"—the period of time intermediate between two regular terms as fixed by law.—*Gamble v. Fowler*, 58 Ala. 576. The plain purpose of the statute is to exact diligence and prevent *laches* on the part of execution creditors. The liens of their executions can only be kept alive on condition that they are regularly issued in the manner and at the times, or intervals prescribed by statute. While as much as six months may be permitted to elapse between *the issue* and *the return* of an execution from the probate court, yet, after the advent of the return term, a new occasion arises for the repetition of due diligence. The execution must again go into the sheriff's hands without allowing an "entire term" to elapse—that is, the entire interval between two regular monthly terms, such as are fixed by law. The policy of the law is to require executions to be practically in the hands of the sheriffs until they are satisfied.

The defendant in execution, Gardner, is shown to have died on the 29th day of September, 1882, when the execution was

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in the sheriff's hands. There was then a lapse extending from the second Monday in December, 1882, to the 21st of April, 1883, being a period of more than four months. Four entire terms of the probate court were thus allowed to elapse without the issue of any execution. This operated, in our judgment, as a loss of the lien.—Code, 1876, § 3213.

The conclusion, thus arrived at, is the only one which we can reach upon any sound principle of construction. The case seems to be a *casus omissus* in the law, possibly needing legislative attention. The analogies sought to be drawn from the orphan's court, and executions formerly authorized to be issued from it, do not, in our opinion, affect the construction which we have above adopted.

The demurrer to the bill was properly sustained, and the decree of the city court is affirmed.

## Averett & Griffin v. Milner & Wilson.

### *Action for Recovery of Personal Property in Specie.*

1. *Detinue ; when judgment by default erroneous.*—In the statutory action for the recovery of personal property *in specie*, a judgment by default in favor of the plaintiff is erroneous, when the verdict of the jury does not ascertain the alternate value of the property sued for.

APPEAL from Jefferson Circuit Court.

Tried before Hon. S. H. SPROTT.

This was an action under the statute for the recovery of designated articles of personal property *in specie*, brought by the appellees against the appellants, and was commenced on 22nd November, 1882. A judgment by default having been entered, on a subsequent day of the term, a writ of inquiry was executed, the jury, by their verdict, assessing the plaintiffs' damages for the detention of the property, but failing to ascertain the alternate value of the property. No judgment was rendered for such value. The judgment rendered is here made the basis of the assignments of error.

R. J. LOWE, for appellant, cited *Smith v. Wiggins*, 3 Stew. 221; *Bell v. Pharr*, 7 Ala. 807; *Cummings v. Tindall*, 4 Stew. & Port. 357; *Brown v. Brown*, 5 Ala. 508; *Wittick, Adm'r, v. Keiffer*, 31 Ala. 199; *Chandler v. Jones*, 56 Ala. 595.

Name of appellee's counsel not disclosed by the record.



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BRICKELL, C. J.—In an action for the “recovery of personal property *in specie*,” which corresponds to the common-law action of detinue, a judgment by default in favor of the plaintiff is erroneous, if the verdict of the jury does not ascertain the alternate value of the chattels.—Code of 1876, § 2944; *Cummings v. Tindall*, 4 St. & Port. 357; *Bell v. Pharr*, 7 Ala. 807.

Reversed and remanded.

## Watson v. Martin, Adm'r.

### *Statutory Real Action in Nature of Ejectment.*

1. *Construction of will; what an executorial power, and not a mere personal trust.*—A testator, after providing for the payment of debts, directed that his estate, real and personal, should remain in the hands of his wife, “to rear and educate his three children, and to remain hers during her life-time or widowhood,” and that, in case of her marriage, his estate, real and personal, should be sold, and the proceeds equally divided between her and his three children. *Held*, that the power of sale expressed in the will is not a mere personal trust, to be executed only by the executor, but is a general power, unattended by any discretionary power, or evidence of personal confidence, which may be exercised, under the statute, by an administrator *de bonis non*.

2. *Same; conversion of realty into personalty.*—It was further held, the widow having married, that under the will, as affected by the widow's marriage, the children did not take the land as land, but that it was converted into personalty, requiring the services of a personal representative for its administration.

3. *Sale of decedent's land; when title not divested.*—After her marriage, the widow and her husband, acting under an order of the probate court, for that purpose, granted on their petition, sold the devised land for partition, and she became the purchaser, but gave no notes for, nor afterwards paid the purchase-money. The sale was reported to, and confirmed by the court, but no report of the payment of the purchase-money, no order to make title, and no conveyance of the land were ever made. *Held*, that the title to the land was not divested out of the testator's estate.

4. *Deed to land by wife alone; when void.*—It was further held, that the individual deed of the widow, purporting to convey the land to her children by the testator, in which her second husband did not join, was a nullity.

5. *Lands converted by will into personalty; when interest of parties can not be determined at law.*—The children, after having received the conveyance from their mother, having sold and conveyed to another, it was further held, that if the purchaser from them is the real owner of their shares, on proper application and showing, he should be allowed to take their places, and to receive their legacies; that if the widow is indebted to the estate, or if the estate is indebted to her, this should be considered in settlement and distribution; and that if the widow has already received her full share of the estate, there is no occasion for a sale or di-

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vision of the lands; but that these are questions which a court of law can not determine.

APPEAL from Barbour Circuit Court.

Tried before Hon. H. D. CLAYTON.

The facts are stated in the opinion.

McKLERoy & COMER, for appellant.—(1) The will created personal trusts in the executor and executrix, and the appellee, who is administrator *de bonis non, cum testamento annexo*, having no power to execute the trusts, has no right to recover the land sued for.—*Perkins v. Lewis*, 41 Ala. 649; *Anderson, Adm'r, v. McGowan*, 42 Ala. 280; s. c. 45 Ala. 462; *Pinney v. Werborn*, 72 Ala. 58; *Morgan v. Casey*, 73 Ala. 222. (2) Even if the will did not create a personal trust in the executor and executrix, the administrator *de bonis non* has no right to recover the land from the vendee of the heirs, there being no debts against the estate, and nothing remaining for the administrator to do touching the administration of the estate.—*Owens v. Childs*, 58 Ala. 113.

JERE N. WILLIAMS, *contra*. (1) The will imposed no personal trust as to the matter of sale and division. It required that, upon the widow's marriage, the property should be sold and divided. No discretion in this particular is allowed to the executors. No directions are given, no limitations imposed, nor is there, in this special provision, any thing other than the plain requirement to sell and make division. (2) The widow did not acquire the legal title by her purchase. She only took an inchoate equity, capable of being made a perfect equity by payment of the purchase-money. She could convey nothing more than she had acquired, and her vendees were charged with notice of the character and extent of her interest and rights under the purchase.—*Ketchum v. Creagh*, 53 Ala. 224; *Wallace v. Nichols*, 56 Ala. 321; *McCully v. Chapman*, 58 Ala. 325. (3) The deed executed by the widow and the deeds executed by the children did not operate a sale and division under the terms of the will. The legatees had no power to take such steps. This point discussed with following citation of authorities: *Carter v. Owens*, 41 Ala. 217; *Calhoun v. Fletcher*, 63 Ala. 574; *Nelson v. Murfee*, 69 Ala. 598; *Bell v. Craig*, 52 Ala. 215; *Patton v. Crow*, 26 Ala. 426; *Cruikshank v. Luttrell*, 67 Ala. 318. (4) But if they had the authority to make sale and division, they did not execute the will in this respect. The will certainly contemplated a sale as a single, separate event, a matter to be done at one time, and not by piecemeal, and at different times. The widow was a legatee,

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and yet she got nothing. Besides, her conveyance, being without the concurrence and signature of her husband, was a nullity. (5) A division made by heirs amongst themselves, and without administration, carries only an equitable title.—*Carter v. Owens*, 41 Ala. 217; *Anderson v. Anderson*, 37 Ala. 683; *Marshall v. Crow*, 29 Ala. 278. Hence, the appellant, claiming under them, has no such title as will prevail in a court of law. The testator made no specific bequests of property, real or personal. The legacies, if they may be so designated, are of money only, and not in defined sums. The fund to be divided must be of the estate of the testator, and that fund can be realized only in one way. (6) The administrator *de bonis non* may recover although it is shown that there are no debts. *Calhoun v. Fletcher*, 63 Ala. 574; *Casey v. Morgan*, 73 Ala. 222; *Doe v. Hardy*, 52 Ala. 291; *Cruikshank v. Luttrell*, 67 Ala. 322.

STONE, J.—Charles D. Bush died in 1853, leaving a will which was probated after his death. He appointed Selina Bush, his wife, executrix, and Seaborn J. Dubose executor of his will. Mrs. Bush entered upon the execution of the trust, but whether Dubose acted is not shown. At his death Mr. Bush owned lands, and probably personal estate. He left three children. After providing for the payment of debts, testator directed that his estate, real and personal, remain in the hands of his wife “to rear and educate his three children, and to remain hers during her life-time or widowhood.” In case of the marriage of Mrs. Bush, the will directed testator’s estate, real and personal, to be sold, and [the proceeds] “equally divided between her and the three children.” No other clause of the will need be noticed here.

In 1862 Mrs. Bush intermarried with Glover, who, by virtue of his marriage, became executor with her of the will. Soon afterwards they petitioned for, and obtained an order of the probate court, to sell the lands for division. They sold, and the executrix, Mrs. Glover, became the purchaser. She gave no notes, and did not pay the purchase-money. Nevertheless, they reported the sale to the probate court, and it was confirmed. No report of payment of the purchase-money, and no order to make title were ever made, and no conveyance of the lands to Mrs. Glover was ever executed. In 1873 Mrs. Glover, by her individual deed, in which her husband did not join, conveyed the lands to her three children by Bush, her former husband. Subsequently, and before this suit was brought, the three children sold their several interests in the lands in controversy, and Watson, the defendant in this suit, became the owner thereof. In 1873, Glover and wife resigned the execu-



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torship of Bush's will, their resignation was accepted, but they have made no final settlement of their administration. How their executorial accounts stand, is not shown.

In 1882, and at the instance of Glover, Martin was appointed administrator *de bonis non* of the estate of Bush *cum testamento annexo*, and immediately instituted this statutory real action for the recovery of the lands. The court gave the general charge in favor of the plaintiff, at his written request, which was excepted to; and there were verdict and judgment for the plaintiff. It was proven and admitted that Bush's estate owed no debts, when Martin was appointed administrator.

We can not assent to the argument of counsel, that the power of sale expressed in Mr. Bush's will, is a mere personal trust, to be executed only by the executors. It is a general power, unattended by any discretionary power, or evidences of personal confidence. Such power, under our statute, may be exercised by the administrator *de bonis non*.—Code of 1876, § 2218; *Coleman v. Camp*, 36 Ala. 159; *Ex parte Dickson*, 64 Ala. 188; *Mitchell v. Spence*, 62 Ala. 450.

It is very clear that the title to the lands in controversy has not been divested out of the estate of Mr. Bush, by any proceedings shown in this record. It requires a conveyance to divest title, and none was made in this case. If there had been a necessity for an order of sale (there was not), then, to divest title, there must have been, not only a sale, reported and confirmed, but report that the purchase-money was paid, order to make title, and title actually made.—*Ketchum v. Creagh*, 53 Ala. 224; *Wallace v. Nichols*, 56 Ala. 321; *McCully v. Chapman*, 58 Ala. 325; *Calhoun v. Fletcher*, 63 Ala. 574.

There is, however, another defect in the defense offered, which renders it entirely unavailing at law. Under the will, as affected by the marriage of Mrs. Bush, the children did not take the land, as land. It was directed to be sold, and the proceeds divided equally between the widow and her three children. This converted the realty into personalty, and required the services of a personal representative for its administration.—*Hemphill v. Moody*, 64 Ala. 468.

We need not and do not say, that the legatees under Mr. Bush's will, all being adults, could not have agreed together, and divided the lands and other property, without a sale. They are not shown to have done so. The deed of Mrs. Glover, not joined in by her husband, is a nullity.

If Watson is the real owner of the shares of the several children, then, on proper application and showing, he should be allowed to take their places, and to receive their legacies. And if Mrs. Glover is indebted to the estate, or if the estate is

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indebted to her, this should be considered in settlement and distribution. We say distribution; for the estate must be distributed entirely as personalty. If, however, Mrs. Glover has already received her full share of the estate, then there is no occasion for a sale or division of the lands, as Watson appears to own all the remaining interests. But a court of law can not determine these questions.—*Owens v. Childs*, 58 Ala. 113.

The judgment of the circuit court must be affirmed.

## Rouse & Smith v. Martin & Flowers.

### *Bill in Equity to enjoin Erection of Nuisance.*

1. *Nuisances; jurisdiction of court of equity to restrain.*—The jurisdiction of a court of equity to restrain nuisances rests on the imperative necessity of preventing irreparable injury and a multiplicity of suits at law, and should be cautiously and sparingly exercised. Hence, an injunction against a private nuisance will not be granted on account of a trifling discomfort or inconvenience suffered by the party complaining, but only where there is a strong and mischievous case of pressing necessity.

2. *Same; each case decided upon its own particular facts.*—Where it is sought to restrain by injunction the prosecution of a business or vocation which is lawful in itself, on the ground that it is obnoxious to the health, comfort or convenience of the neighborhood, by reason of disagreeable noises, offensive odors, noxious gases and the like, no general rule can be laid down sufficiently specific and certain to apply to all cases; but each case must be decided upon its own particular facts, the whole question being one largely of degree, to be determined in the light of human experience.

3. *Same; when court of equity will not enjoin.*—Where an injunction is sought to restrain the construction of works which are of such a nature that it is impossible for the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused in the first instance. The mere fact of the diminution in the value of complainant's property, or the increased risks of fire, occasioned by the erection of such works upon an adjoining lot, in a town or city, without more, is not sufficient ground for equitable relief.

4. *Same; when court of equity will not enjoin erection of steam gin-house.*—Ginning cotton being a useful business, common to the country, and not necessarily a nuisance, a court of equity will not interfere by injunction to restrain the erection of a building with machinery for ginning cotton by steam, on a lot in a city about eighty-eight feet from the complainant's residence, and separated from it by a public street, when the injury sought to be prevented is merely anticipated, is greatly a matter of speculation, and it is not clearly shown that it is not reasonably possible for the business to be conducted so as not to be a nuisance.

APPEAL from Butler Chancery Court.

Heard before Hon. JNO. A. FOSTER.

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This was a bill in equity by W. P. Rouse and F. C. Smith against Martin & Flowers; was filed on 21st May, 1884; and the case made thereby is sufficiently stated in the opinion. On the filing of the bill, a temporary injunction was granted by Hon. John P. Hubbard, Judge of the Second Judicial Circuit, which the defendants moved to dissolve on the denials in the answer, and because the bill was without equity. On the hearing, the chancellor caused a decree to be entered, sustaining the motion, and dissolving the injunction; and that decree is here assigned as error.

GAMBLE & RICHARDSON and BUELL & LANE, for appellants. (1) The ground of the jurisdiction of a court of equity to restrain the commission or continuance of a private nuisance, is its ability to afford more complete remedies than courts of law. It interferes only when there is immediate, pressing necessity for the prevention of an injury, incapable of adequate compensation in damages at law, or such as, from its continuous or permanent mischief, must occasion a constant, recurring grievance, which can not be otherwise prevented than by an injunction. When the thing sought to be restrained is not unavoidably and in itself obnoxious, but only that which may, according to circumstances, prove so, then the court will refuse to interfere until the matter has been tried at law. *Ogletree v. McQuagg*, 67 Ala. 584; *Kingsbury v. Flowers*, 65 Ala. 484; *St. James v. Arrington*, 36 Ala. 548; *Rosser v. Randolph*, 7 Port. 245; *Ferguson v. City of Selma*, 43 Ala. 400; *Dorsey v. Allen*, 39 Am. Rep. 704; *Green v. Lake*, 28 Am. Rep. 378; *Demarest v. Hardham*, 34 N. J. (Eq.) 469; *Ray v. Lynes*, 10 Ala. 64; 3 John. Ch. 287; 2 Dan. Ch. Prac. 1637, and n. 5; 2 Story's Eq. Jur. § 925; *Davidson v. Isham*, 1 Stockton (N. J.), 186. (2) The allegations upon which they found their title to relief must be direct and positive, clear and unambiguous.—*R. R. Co. v. Lancaster*, 62 Ala. 562; *Read v. Walker*, 18 Ala. 329. And not upon information and belief.—*Spence v. Duren*, 3 Ala. 253; *Ex parte Reid*, 50 Ala. 444; 1 Dan. Ch. Pl. & Pr. 313; *Adams v. Michael*, 38 Md. 125. They must set forth fully and particularly the nature and character of the threatened nuisance they seek to restrain; in what it will consist, and their knowledge as to the use, as well as the nature and character of the injury that will result to the parties complaining.—*Thebaut v. Canova*, 11 Fla. 225. (3) The bill must set forth such a state of facts as leave no doubt upon the question of nuisance and of its injurious results; for if there is any doubt upon either of these points, the benefit will be given to the defendant. A mere allegation of great and apprehended danger is not enough; facts must be stated that



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show it.—*Kingsbury v. Flowers*, 65 Ala. 486; *Walcott v. Melick*, 3 Stock. (N. J.) 205; *Turnpike v. Yuba*, 13 Cal. 190; *Clark v. Lawrence*, 6 Jones (N. C.) Eq. 83; *Cleveland v. Gas Co.*, 20 N. J. (Eq.) 202. (4) The erection on defendant's lot of a two-story wooden house, and its use thereafter as a gin-house, is not a nuisance *per se*, but is a lawful exercise by appellees of their dominion over their property, against which adjoining proprietors can not complain, unless it is shown that, from the peculiar manner of its erection and use, irreparable injury will result to them. This point discussed at length, and following authorities cited: *Rhodes v. Dunbar*, 57 Pa. St. 274; *Dorsey v. Allen*, *supra*; *Green v. Lake*, *supra*; *Huckenstine's Appeal*, 70 P. St. 102; *Brown v. Piper*, 1 Otto. 42; *Salomon v. State*, 28 Ala. 88; *St. James v. Arrington*, 36 Ala. 546; *Kingsbury v. Flowers*, 65 Ala. 479; 1 High on Inj. (2d Ed.) §§ 787–8; Wood on Nuis. (2d Ed.) §§ 796–7.

J. F. STALLINGS and WATTS & SON, *contra*.—(1) Whilst defendants have a right to build on their own property, they have no right to carry on any business there which, by noise, smoke, dust, or noxious or disagreeable smells, disturbs the quiet enjoyment of the adjoining proprietor, or which renders the air of the adjoining proprietor impure or unhealthy. The owner of property must so use it, that he shall not impair his neighbor's right to good health, pure air, or inflict upon him unseasonable noises at unseasonable hours. Whilst mills, or gins, or other manufactories are legal and necessary, it is neither legal nor necessary that they shall be so located as to interfere with the rights of others in the enjoyment of their houses. When, therefore, such mills, gins, or other manufactories create noises that prevent or disturb sleep, or taint the atmosphere with vapors, or smoke, or dust, prejudicial to health, or nauseous to the smell, they constitute nuisances, against which equity will enjoin.—Wood on Nuisances, §§ 497, 504; *Catlin v. Valentine*, 9 Paige, 576. Smoke alone may constitute a nuisance.—Wood on Nuis. § 505, and authorities cited in note 7; *Ib.* § 509. Noise alone may create a nuisance.—*Ib.* §§ 611, 613–15; *Ib.* §§ 619–34. The corruption of the atmosphere by the exercise of any trade, or by any use of property that impregnates it with noisome stench, has ever been regarded as the worst class of nuisances.—*Ib.* §§ 561–3, 598, and note 1 on page 682; *Ib.* §§ 599, 608, 610, 799. (2) A person can not build extensive works and make heavy expenditures of money for the exercise of a trade or business, that will invade the premises of another with smoke, noxious vapors, or noisome smells, to an unwarrantable extent; and then present his expenditures as a reason why he should not be enjoined; neither can he successfully

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urge in his defense, that his trade or business is a *useful one, and beneficial* to the community.—Wood on Nuis. §§ 802, 816; High on Inj. § 491. (3) The allegations of the bill discussed for the purpose of showing, under the authorities cited above, that there is equity in the bill, and that there exists a nuisance to complainants, in their property, and in the comfortable enjoyment thereof, produced by the wrongful act of the defendants.

SOMERVILLE, J.—The appeal is from a decree of the chancellor dissolving an injunction, which had been granted at the instance of the appellants to interdict the appellees from erecting a structure, with machinery for ginning cotton, in proximity to the dwelling-houses of the complainants and certain of their tenants in the city of Greenville. The nearest point of the proposed gin-house, which is to be a wooden structure, would be within about eighty-eight feet of the dwelling of one of the complainants, on a lot owned by the defendants on the opposite, or south side of a public street. It is alleged by the complainants that the business of ginning seed cotton by steam-power, as purposed by the defendants, will work irreparable damage to them, by rendering their houses uncomfortable and dangerous for occupation as places of residence, that the hazard of fire will be greatly increased, the noise of the machinery discomfort them, and that the atmosphere will be rendered impure and unwholesome by smoke, dust, small particles of lint-cotton, decaying cotton seed, and other filth necessarily incident to the business, in which much stock will probably be used in hauling with wagons.

The foundation of this jurisdiction of equity, in assuming to restrain nuisances, rests in the imperative necessity of preventing irreparable injury and a multiplicity of suits at law.—*State v. Mayor, etc., of Mobile*, 5 Port. 279; 1 High on Inj. § 739; 2 Story's Eq. § 925. It is the exercise of an extraordinary power, which, as was long ago said by this court, should be "cautiously and sparingly exercised."—*Ray v. Lynes*, 10 Ala. 63. An injunction, therefore, of a private nuisance will generally be granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or inconvenience suffered by the party complaining. *Coker v. Birge*, 54 Amer. Dec. 347, note, p. 351; *St. James Church v. Arrington*, 36 Ala. 546.

The rule has long been recognized as quite different where the thing sought to be prohibited is *per se* a nuisance, and where it is not unavoidably noxious in itself, but *may* prove so according to circumstances, or otherwise. In the first class of cases an injunction will ordinarily be granted without waiting

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for the result of a trial at law. In the second class the court will generally refuse to interfere until the matter has been tried at law.—*St. James Church v. Arrington, supra*; Adams' Eq. (7th Amer. Ed.) 211, note 1.

The cases are numerous where equity has intervened to prevent the carrying on of a business or vocation, although lawful in itself, on the ground of its being obnoxious to the health, comfort or convenience of neighboring residents, by reason of disagreeable noises, offensive odors, noxious gases and the like. 1 High on Inj. §§ 772-73. No general rule can be laid down sufficiently specific and certain to apply to all cases; but, as often said, each case must be decided upon its own particular state of facts, and the whole question must be largely one as to degree, being determined in the light of human experience.

Where the injury complained of is not a nuisance *per se*, but may become so by reason of circumstances—being uncertain, indefinite or contingent—equity, as we have said, will not interfere. So the public benefit will be considered, and when it preponderates over the private inconvenience, no relief will generally be granted.—*Dorsey v. Allen*, 85 N. C. 358, (39 Am. Rep. 704). It is a rule of universal recognition, that in *doubtful cases* an injunction will always be denied, or dissolved on motion when granted *ad interim*. A very strong case must, therefore, be made by the bill, and if there be a reasonable doubt as to the probable effect of an alleged nuisance, either on the proof, affidavits, or on the construction of the facts stated in the bill, there will be no interference until the matter is tested by experiment in the actual use of the property.—Wood on Nuisances, §§ 796-97; 2 Story's Eq. Jur. § 924a, NOTE 1; 1 High on Inj. § 788. As said in *Kingsbury v. Flowers*, 65 Ala. 479 "there must be such a clear, precise statement of *facts*, that there can be no reasonable doubt, if the acts threatened are completed, grievous injury will result." Hence, the following rule stated by a recent author: "Where," he says, "an injunction is asked to restrain the construction of works of such a nature that it is impossible for the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused in the first instance." 1 High on Inj. § 743. Great caution, he further observes, should always be exercised before interfering with establishments which have a tendency to promote public utility or convenience; and in cases of this nature, "equity will not enjoin the lawful use of such property in a city, when, by the proper application of scientific appliances and machinery, the evils complained of may be remedied; and, in such case, the court will go no further than to require such appliances to be used." 1 High on Injunc. § 787; *Green v. Lake*, 54 Miss. 540 (28



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Amer. Rep. 378). And where it is sought to restrain a business establishment, which is not *per se* a nuisance, but only liable to become such by the manner in which it is carried on by the proprietor, the course now generally adopted by the courts is stated to be, to hold the bill until the objectionable results can be remedied by scientific and skillful appliances, at least where the answer discloses that such remedies are practicable. Wood on Nuisances, § 823. But this is a matter resting greatly within the sound discretion of the chancellor.

The law is settled, on sound reasons, that the mere fact of the diminution of the value of complainant's property, or the increased risks from hazard of fire, occasioned by a structure erected by a defendant upon a lot adjoining the complainant's premises, without more, is unavailing as a ground of equitable relief.—2 Story's Eq. Jur. § 925 ; *Morris v. Prudden*, 5 C. E. Green, 530 ; 1 High on Inj. § 788 ; Wood on Nuis. § 511. This is one of the many risks and discomfits naturally incident to town or city life, which persons of prudence can not fail to reasonably anticipate.—*Ray v. Lynes*, 10 Ala. 63.

Smoke, offensive odors, or disagreeable noise and vibration may of course constitute a nuisance so imperiling the comfort of one's existence, his health, or the safety of his property, as to call for injunctive relief at the hands of a court of equity. This is upon the principle, that if one makes an unreasonable or unlawful use of his property, "so as to produce material annoyance, inconvenience, discomfort or hurt to his neighbor, he will be guilty of a nuisance to his neighbor."—*Campbell v. Seaman*, 63 N. Y. 568 (20 Amer. Rep. 567). It is a just sequence of the maxim, *Sic utere tuo ut alienum non laedas*. In determining the question of interference, the court will look at the *facts* which are stated in the bill, giving little or no weight to the mere opinion of the complainant that they will constitute a nuisance, unless such a conclusion clearly follows by proper inference from these facts. So of the denials of the answer, on a motion to dissolve an injunction which may have been granted.—*Catlin v. Valentine*, 9 Paige, 575 (38 Amer. Dec. 567) ; 1 High on Inj. § 790.

Let us briefly apply the foregoing principles to this case. It is clear that the building sought to be erected by the defendants can not be regarded as a nuisance, but only the *use* to which it is to be devoted. This is admitted to be a useful business, which is common to the country, and one which should not be discouraged by too ready an interference by the strong arm of the courts. Taking the facts as alleged in complainants' bill, and discarding all allegations which may properly be regarded as mere matters of opinion, and keeping in view that the injury sought to be prevented is merely apprehended by an-

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ticipation, and must, therefore, be a matter greatly of speculation, we can not say that the chancellor has come to an erroneous conclusion. We do not clearly see that it is not reasonably possible for the business to be conducted so as not to be a nuisance. In *Ray v. Lynes*, 10 Ala. 63, this court, upon like principles, declined to enjoin the erection of a black-smith shop upon a lot adjoining the dwelling-house of the complainant in the town of Tuskegee. And in *St. James Church v. Arrington*, 36 Ala. 546, it refused to restrain the erection of a livery stable in close proximity to a church. It was said by the court, that, admitting the strong probability that inconvenience and discomfort might result to the complainants from the use of the stable, "yet the injury apprehended is not of that 'vast and overwhelming' character which would justify a departure from the general rule above stated, which, as we have seen, denies an injunction in such cases, in advance of a trial at law." *Kingsbury v. Flowers*, 65 Ala. 479; *Green v. Lake*, 54 Miss. 540 (28 Amer. Rep. 378); *Dorsey v. Allen*, 85 N. C. 358 (39 Amer. Rep. 704); 3 Wait's Act. & Def. 703, § 9.

The decree of the chancellor dissolving the injunction must be affirmed.

## Tennessee and Coosa Railroad Company v. East Alabama Railway Company.

### *Ejectment for Recovery of Railroad.*

1. *Ejectment for recovery of a railroad; when description in complaint not sufficient.*—As the mere survey and location of the line of a railroad, made twenty-five years ago, can not be supposed to have left such visible marks as would enable one to trace it without the aid of the engineer's report and chart, even if it could be done with such aid, such a description in the complaint in an action of ejectment, brought to recover the track or road-bed of the railroad, without more, is too indefinite, and is, therefore, insufficient to authorize a recovery.

2. *Same.*—Nor is the description, in such complaint, of that part of the right of way lying outside of the graded track sufficient to authorize a recovery thereof, when its dimensions are not given.

3. *Same; when description sufficient.*—Where, however, the averments of the complaint show that the railroad track was not only surveyed and located, but was cleared of timber and graded, with excavations and embankments, and a superstructure, over which locomotives and cars were running, and that it extended from one given point to another, and was the only railroad between those points, the description is sufficient to authorize a recovery.

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4. *Ejectment; will lie for recovery of road-bed and right of way of railroad.*—While, as a general rule, ejectment will not lie for an easement, or to be let into the use or occupation of a servitude, it will lie for the recovery of lands claimed and condemned as the road-bed and right of way of a railroad.

5. *Same; when plaintiff's title can not be disputed.*—Where a defendant in ejectment acquires his possession, and the title he asserts, derivatively from the plaintiff, he can not be heard to dispute the latter's title.

6. *Sale by assignee in bankruptcy under bankrupt law of 1867; authority to make.*—The authority of an assignee in bankruptcy to sell the property of the bankrupt under the bankrupt law of 1867, may be reduced substantially to two methods: First, a sale without an order of court, in which case the assignee sells simply the unascertained interest of the bankrupt, leaving to the purchaser the right and duty of settling and determining all controversies as to disputed ownership, and all litigation that may grow out of such disputed ownership; and second, a sale of the entire property, and the entire title to it, freed from all conflicting claims and liens, under section 5063 of the U. S. Rev. Statutes, thereby placing and leaving its proceeds in its stead, as the subject of contention and litigation; and between these two methods there is no middle ground, to which the assignee is authorized to resort.

7. *Same; when sale does not conform to § 5063 Rev. Statutes; limitation under § 5057 of Rev. Statutes.*—Where, on the petition of an assignee in bankruptcy, a decree is made in the bankrupt court, recognizing and establishing the priority of the lien of a creditor who is alone made a party to the petition, and directing a sale of the bankrupt's property subject to that lien, but freed from all other liens, a sale made under such decree does not conform to the provisions of section 5063 of the U. S. Rev. Statutes; and a claimant of part of the property sold, who was not made a party to the petition, and who had no notice of the proceedings, is not barred under the provisions of section 5057 of the Rev. Statutes, because he did not, within two years, prefer his claim in the bankrupt court.

8. *Property of bankrupt; interest of assignee in.*—Where the property of a bankrupt has not been conveyed in fraud of his creditors, the assignee in bankruptcy takes no greater interest in, or better title to it, than the bankrupt himself had.

9. *Possession of vendee under executory contract of purchase; when an estoppel.*—Where a party goes into possession of real estate under an executory contract of purchase, he is estopped from disputing his vendor's title; and, on his being declared a bankrupt, his assignee, standing in his shoes, is equally estopped.

10. *Bankruptcy; limitation of two years under § 5057 Rev. Statutes.* Section 5057 of the Rev. Statutes applies the two years bar to suits "touching property or rights of property transferable to, or vested in the assignee," and extends no further; and hence, where the bankrupt had no property or right of property in the subject of litigation, it neither vesting in nor being transferable to the assignee, the provisions of the statute do not apply.

ALPEAL from Etowah Circuit Court.

Tried before Hon. H. D. CLAYTON.

The facts are stated in the opinion.

W. H. DENSON, with whom was SAM'L F. RICE, for appellant. (1) The road-bed, track, etc., of a railroad company is real estate, and for its recovery an action of ejectment will lie.



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This point discussed at length, with citation of following authorities: Tyler on Eject. 37, 39; 3 Wait's Ac. & Def. 4, §§ 1, 2 *et seq.*; 1 Chitty's Plead. (16 Am. Ed.) m. pp. 275-6; *Rowan v. Kelsey*, 18 Barb. 484; *Nichols v. Lewis*, 15 Conn. 137; 1 Wash. Real Prop. (4th Ed.) pp. 2-3, §§ 2, 2a, 3, and note, m. p. 32, § 36; *S. & N. R. R. Co. v. Pilgreen*, 62 Ala. 305; *Luke v. Calhoun Co.*, 52 Ala. 115; *Smith v. Gayle*, 58 Ala. 600; *Dummer v. The Selectmen, etc.*, 40 Am. Dec. 213; *Central Pac. R. R. Co. v. Benity*, 5 Sawyer, 118; *Hazen v. B. & M. R. Co.*, 2 Gray, 574; *Winona v. Huff*, 11 Minn. 119; *Mankato v. Willard*, 13 Minn. 13; *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150; *C. & P. R. R. Co. v. Holton*, 32 Vt. 47; *T. & B. R. R. Co. v. Potter*, 42 Vt. 265; *R. Co. v. Davis*, 2 Dev. & Bat. 467; *Giesey v. C. W. & Z. R. R. Co.*, 4 Ohio St. 308; *Hoboken Land Co. v. Hoboken*, 36 N. J. Law, 540; *Klinkener v. School Directors*, 1 Jones (Penn.), 444; *Turner v. Reynolds*, 11 Harris (Penn.), 199; *Chicago v. Wright*, 69 Ill. 322; *Mahon v. San Rafael T. R. Co.*, 49 Cal. 270; *Cincinnati v. White*, 6 Pet. 431; *M. & O. R. R. Co. v. Williams*, 53 Ala. 597; *Tanner v. S. & N. R. R. Co.*, 60 Ala. 635; *M. & M. R. R. Co. v. Blakey*, 59 Ala. 471; *Cook v. Central R. R. Co.*, 67 Ala. 541; *Kennedy v. Jones*, 11 Ala. 63; *Jackson v. Buel*, 9 Johns. 298. (2) This suit was not barred by the provisions of section 5057 of Revised Statutes (U. S.). Bankruptcy proceedings are entirely statutory; and no authority can be exercised in bankruptcy by the court, by the assignee, or by any other person, than such as is conferred by the statute.—*Glenny v. Langdon*, 98 U. S. 29; *Gifford v. Helms*, 98 U. S. 252; *Shaw v. Lindsey*, 60 Ala. 351; *Nat. Bank v. U. S.*, 107 U. S. 450; *Feibleman v. Packard*, 109 U. S. 421; *Paulling v. Lee*, 20 Ala. 765. In order that section 5057 of Rev. Statutes may apply in any case, there must be a concurrence of three conditions: 1st. The controversy must be in respect to some property or rights of property of the bankrupt; 2d, such property must be transferable to, or vested in such assignee; and 3rd, the suit must be in the name of one of the two parties named in the act.—*Glenny v. Langdon*, *supra*; *Gifford v. Helms*, *supra*; *Marshall v. Knox*, 16 Wall. 556; *Smith v. Mason*, 14 Wall. 431; *Morgan v. Thornhill*, 11 Wall. 75; *Jenkins v. Bank*, 106 U. S. 574; *Moses v. St. Paul*, 67 Ala. 171. (3) Neither party claims under any bankrupt proceedings; no title of an assignee is involved in this action; and no property of a bankrupt is litigated in this suit. The deed executed by the appellant to the East Alabama & Cincinnati R. R. Co. was construed by this court in *Tennessee & Coosa R. R. Co. v. East Alabama R. Co.*, 73 Ala. 426; and it was then held that the conditions contained in the deed

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were *precedent*; and the grantee having failed to perform them, no title to the property ever vested in the grantee under said deed.—See *Cowell v. Springs Co.*, 100 U. S. 55. At the time of the bankruptcy of the E. A. & C. R. R. Co., there had been a failure to perform some of the conditions of said deed; and the appellant then had the right to enter and retake its property for condition broken. The bankruptcy of the grantee made it impossible for it to perform said conditions, thereby, *ipso facto*, divesting the grantee of all claim to, and possession of said property.—*Nichol v. Eaton*, 91 U. S. 716. Prior to the commencement of this action, the appellant made its entry for condition broken; and when it entered, it was in of its former estate and title, free from all intervening estates, titles, liens and incumbrances, whether created by law, or by the grantee itself.—4 Kent. m. pp. 126-7; *Cross v. Carson*, 44 Am. Dec. 757, *note*; Tyler on Eject. 179-80; *Collins v. Whigham*, 58 Ala. 438; *Morris v. Beebe*, 54 Ala. 308. The appellee does not set up any claim or title to the property under any proceedings in bankruptcy, or under any assignee in bankruptcy. It claims under the foreclosure proceedings had in the chancery court of Lee county. In the proceedings in bankruptcy, the rights of the trustees, Barnes & Clews, were expressly reserved unimpaired. The purchasers at the assignee's sale were the only parties defendant in the foreclosure proceedings; and they there set up all their claim and title to said property derived from the proceedings in bankruptcy, and the chancery court decided against them, and ordered the property sold; and the appellee claims under the purchasers at that sale. See *Kelly v. A. & C. R. R. Co.*, 58 Ala. 489; *Colt v. Barnes*, 64 Ala. 108. To the chancery suit the appellant was not a party. The chancery court having decided adversely to the purchasers at the assignee's sale, the title of the assignee and of the purchasers at his sale is extinct, and they are estopped from setting up their claim and title to said property in any other suit or court.—*Davis v. Friedlander*, 104 U. S. 570. The appellee, then, would certainly be estopped from setting up that title. (4) The bankrupt's title to said property was not such as was transferable to, or became vested in the assignee. The E. A. & C. R. R. Co. was only an executory purchaser, and was estopped from denying or disputing the appellant's title.—*Potts v. Coleman*, 67 Ala. 221; *Cowell v. Springs Co.*, 100 U. S. 55; *Walker v. Reister*, 102 U. S. 470; *Lewis v. Hawkins*, 23 Wall. 119; *Cook v. Tullis*, 18 Wall. 332; *Burnett v. Caldwell*, 9 Wall. 290; *Henley v. Bank*, 16 Ala. 552; *Seabury v. Easton*, 22 Ala. 207; *Relfe v. Relfe*, 34 Ala. 504; *Chapman v. Glussell*, 13 Ala. 50; *Strong v. Waddell*, 56 Ala. 471. It is settled law, that the assignee can assert no



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claim to the property which the bankrupt himself could not assert in a contest between it and the appellant. As to every thing, except fraudulent conveyances and preferences under the bankrupt law, the assignee takes by the assignment as a purchaser from the bankrupt, with notice of all outstanding rights and equities. Whatever the bankrupt could do to make the assigned property available for general creditors, the assignee may do; *but nothing more.*—*Stewart v. Platt*, 101 U. S. 739; *Dudley v. Easton*, 104 U. S. 99; *Hanselt v. Harrison*, 105 U. S. 406; *Smith v. Perry*, 56 Ala. 266. The assignee takes and holds the property in the same condition in which the bankrupt held it, and subject to the same liens and incumbrances. The bankrupt law takes away no right secured to a party by his contract.—*Yeatman v. Sav. Inst.*, 95 U. S. 764; *Jerome v. McCarter*, 94 U. S. 734; *Eyster v. Gaff*, 91 U. S. 521; *Cook v. Tullis*, 18 Wall. 332. See also *Dudley v. Easton*, 104 U. S. 99; *McHenry v. La Societe, etc.*, 95 U. S. 58; *Walker v. Reister*, 102 U. S. 467. (5) The appellant was not a party to any of said bankrupt proceedings; its title to said property was never litigated in said court; and, hence, it is bound by none of the proceedings in said court.—*Ray v. Norseworthy*, 23 Wall. 128; *Smith v. Mason*, 14 Wall. 432; *Marshall v. Knox*, 16 Wall. 555; *Dupasseeur v. Rochereau*, 21 Wall. 130; *Shaw v. Lindsey*, 60 Ala. 351. (6) The bankrupt law operates only upon property belonging to *the bankrupt*, and which is liable to the payment of his debts; and it is only such property that is transferable to, or vests in the assignee within the purview of section 5057 of Rev. Statutes.—*Porter v. Lazear*, 109 U. S. 84; *Nat. Bank v. U. S.*, 107 U. S. 445; *Rhoades v. Blackiston*, 8 Am. Rep. 334; *Harris v. Collins*, 13 Ala. 388; 3 Par. on Con. 472 *et seq.*; *Jones v. Clifton*, 101 U. S. 225; *Marsh v. Armstrong*, 18 Am. Rep. 355. The bankrupt law does not prescribe the title or interest the bankrupt must have in the property to make it subject to the bankrupt's debts; but leaves this entirely with the States.—*Brine v. Ins. Co.*, 96 U. S. 627; *Equator Co. v. Hall*, 106 U. S. 86. In this State, the real estate of a debtor, liable to his debts, is such as he has the legal title to, perfect equity in, or in which he has a *vested legal* interest.—Code, 1876, 3209. Under the decision of the case in 73 Ala. *supra*, p. 426, the E. A. & C. R. R. Co. never had any such title or interest in this property. It was, therefore, not transferable to, nor did it vest in the assignee.

BARNES & SON and SEMPLE & SON, with whom were DUNLAP & DORTCH, *contra*. (1) The description in the complaint is insufficient to support a verdict and judgment. It is obvious that the sheriff could not, from the complaint alone, or from it



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aided by any measurement or plat referred to in it, have found the subject-matter of the suit. This point argued at length, and the following authorities cited and discussed: Code, 1876, § 2960; *Henley v. Branch Bank*, 16 Ala. 559; *Sturdevant v. Murrell*, 8 Port. 317; *Bennett v. Morris*, 9 Port. 171; *Chapman v. Holding*, 60 Ala. 522; 69 Ala. 342. (2) The facts of this case constitute a complete defense under the terms of the Bankrupt Act, which forbids a suit by or against the assignee for any property transferable under the act, except within two years. This point discussed at length, and the following authorities cited and commented upon, in argument: U. S. Rev. Stat. § 5057; *Moses v. St. Paul*, 67 Ala. 168; *Comegys v. McCord*, 11 Ala. 932; *Harris v. Collins*, 13 Ala. 388; *Paulding v. Lee*, 20 Ala. 753; 102 U. S. 469; *Long v. Converse*, 91 U. S. 105; *Wilson v. Glenn*, 68 Ala. 383; *Jenkins v. International Bank*, 106 U. S. 571; *Pike v. Lowell*, 32 Me. 245.

STONE, J.—The present is an action of ejectment, brought by the appellant as plaintiff, and seeks to recover what is described in the complaint as “the following real estate, that is to say, the track or road-bed of the plaintiff as the same was located at and before July 12th, 1871, from Gunter’s landing, in Marshall county, in the State of Alabama, to Gadsden, in Etowah county, in said State, together with all their right of way, grading, trestles, masonry work, culverting work, and property on said line so located, including the railroad from Gadsden to Attala, in said county of Etowah, which railroad is the only railroad from Gadsden to Attala, and is attached to the soil, and is now, and was at the commencement of this suit, used and operated as a railroad by the employees of the defendant corporation, and by the direction and authority of that corporation, and including also the appurtenances of said railroad from Gadsden to Attala. The plaintiff further avers that at and before June 3rd, 1856, it was organized and in existence as a corporation under and by virtue of its charter contained in an act of the General Assembly of the State of Alabama, entitled ‘An act to incorporate the Tennessee and Coosa Railroad Company, approved January 16th, 1844;’” a copy of which act was made part of the count. See Pamph. Acts, 1843–4, pp. 170 to 175. The complaint further averred “that long before June 3rd, 1856, the said railroad and railroad track and bed of plaintiff, as described in this complaint, had been located as stated in this complaint, and that said railroad of plaintiff was and is the same railroad which is first mentioned in the act of Congress, entitled ‘An act granting public lands in alternate sections to the State of Alabama, to

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aid in the construction of certain railroads in said State,' approved June 3rd, 1856. And plaintiff further avers that at the time of said location of its said railroad and railroad track and bed, there were public lands of the United States, designated by odd numbers, not previously sold, nor covered or claimed by any preemption claim, on and along the said railroad and railroad track and bed, some of which public lands were situated between Gadsden and Attala aforesaid.

And plaintiff avers that its said railroad, and railroad track and railroad bed, as located as aforesaid between Gadsden and Attala, . . . . . was upon parts and parcels of some of said odd numbered sections of said public lands, upon and over which the plaintiff had the right to locate its said railroad, railroad track and railroad bed, and did so locate the same in the lawful exercise of its right."

By various rulings in the court below, the contention was narrowed down to that section of the road, about five miles in length, extending from Gadsden, the southern terminus of plaintiff's chartered line, to Attala, all in Etowah county. Hence, we have omitted several averments, not deemed material to the present investigation. The complaint contains the usual averment of ouster and possession by the defendants, and claims damages.

There was a second count, containing averments not found in the first, as follows: "The plaintiff, on and before the 12th day of July, 1871, had, and ever since has had the legal title and the legal ownership of the following realty [describing the property as described and sued for in the first count], and is upon the ground and soil, and upon the aforesaid right of way of the plaintiff, and is the property of the plaintiff.

. . . . . And plaintiff avers that its aforementioned legal title to, and ownership of all the property above described, was acquired by the plaintiff lawfully and properly, but without the exercise of any power to cause the condemnation of lands to the use of a railroad, or to any public use; and without the exercise of any other compulsory power, authorized by the law of Alabama, and without any other means than the lawful and voluntary acts and conduct of those who were the owners of said property, until it became the property of the plaintiff."

In setting forth the counts, as given above, we have described them as they were finally framed, after all the amendments were allowed. Under the plea to the jurisdiction, filed by the defendants, the court required the plaintiff to strike from the complaint all of the property claimed, which lay in Marshall county. The circuit court also ruled, that with the exception of the five miles of road extending from Gadsden to Attala, the description of the property given in the complaint is too

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indefinite to authorize a recovery. In this way the controversy was narrowed to the completed section between those places.

Several grounds are urged by appellee, why the ruling of the circuit court should not be disturbed. First, that the description of the property sued for is too indefinite, and fails to give such information that the sheriff would know of what to put the plaintiff in possession, if he recovered. As we understand the complaint, there is a marked difference in the description of that part of the road which lies between Gadsden and Attala, and that which undertakes to describe the residue of the route. The description of the latter portion must be classed with those held insufficient in *Sturdevant v. Murrell*, 8 Por. 317, and *Bennet v. Morris*, 9 Por. 171. There is nothing in the description, without additional facts not given, which would inform the defendant of what was claimed, or the sheriff, what he was required to put the plaintiff in possession of. The mere survey and location of the line of a railroad, without more, made twenty-five years ago, can not be supposed to have left such visible marks, as to enable one to trace it, without the aid of the engineer's report and chart, even if it could be done with such aid. See *Alexander v. Wheeler*, 69 Ala. 332.

The description of that part of the road from Gadsden to Attala is entirely different. It is so described that its identity can not be easily mistaken. A railroad track, not only surveyed and located, but cleared of timber and graded, having excavations and embankments, extending from one given point to another given point, and being the only such road between those points, it would seem the sheriff would have no difficulty in finding. And when, in addition to these, there is a superstructure, and locomotives and cars running over the track, assurance is made doubly sure.—*Henley v. Branch Bank at Mobile*, 16 Ala. 552; *Chapman v. Holding*, 60 Ala. 522. The description of what is called the right of way—that area of the servitude which lies outside of the graded track—is not sufficient. Its dimensions should have been given, as a guide to the jury, and to the officer executing the writ of possession.

It is objected in the next place, that plaintiff has not sufficient property in the realty to maintain ejectment; that plaintiff has only an easement, and no title to the soil; and that ejectment will not lie for the recovery of an easement.

It is true that ejectment will not lie, as a general rule, for an easement, or to be let into the use or occupation of a servitude. The reason is that the party complaining has only a right in common with the public, or with some other person or persons, to the use or occupation claimed. The right is a qualified, limited one, and, in ordinary cases, is not disturbed by another's



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similar occupation. It is but a privilege to go on the lands of another for a specified, limited purpose, and has no element of exclusiveness in it. A right of way, or of common, may be given as illustrations of this principle.—Washb. on Easements (3d Ed.), 3, 260, 270; *Child v. Chappell*, 9 N. Y. 246; *Morgan v. Boyes*, 65 Maine, 124; *Rees v. Lawless*, 12 Amer. Dec. 295. There are cases which go beyond this doctrine.—*Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *Union Canal Co. v. Young*, 30 Amer. Dec. 212; 2 Wait's Ac. & Def. 747; 2 Redf. Rwy, 553.

Lands claimed and condemned as road-bed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired, not the right of use to be enjoyed in common with the public, or with other persons. The right and use are exclusive, and no one else has any right of way thereon.—*M. & O. R. R. Co. v. Williams*, 53 Ala. 595; *M. & M. Rwy Co. v. Blakely*, 59 Ala. 471; *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *S. & N. R. R. Co. v. Pilgreen*, 62 Ala. 305; *Cook v. Cen. R. R. & Banking Co.*, 67 Ala. 533; *R. & G. R. R. Co. v. Davis*, 2 Dev. & Bat. (Law) 451; *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150; *T. & B. R. R. Co. v. Potter*, 42 Vt. 265.

Ejectment was originally classed as a possessory action. Hence it was, that, at common law, any number of actions could be maintained, by laying the demise at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession, in form legal as distinguished from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterwards found in possession, unless the latter can show a paramount title, or a possession continuous, peaceable and adverse, of sufficient duration to toll entry.—Tyler on Ejectment, 70; *Ib.* 165; *Anderson v. Melear*, 56 Ala. 621. A lessee or termor, during the continuance of a valid lease, may maintain the action against the lessor, although the owner of the entire fee, less the term. So, the title of a railroad corporation to the possession of the soil covered by the road-bed and right of way, will, after condemnation, dominate all adverse claim of possession, even by the owner of the fee. "Although the right which a railroad company acquires to land taken under their charter, is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety require that the possession of the land so taken should be absolute and exclusive against the adjacent landowner, so far as to secure fully every purpose for which the railroad is made and used."—*Conn. & Pass. River R. R. Co. v. Holton*, 32 Vt. 43. "One who has the exclusive right to

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mine coal upon a tract of land, has the right of possession as against the owner of the soil, so far as it is necessary to carry on his mining operations."—*Turner v. Reynolds*, 23 Penn. St. 199, 206. "The right of municipal corporations, or public authorities vested with no higher estate than a public easement, or right by dedication, to invoke the remedy of ejectment, for the possession of streets, public squares, town commons, church and market grounds, is upheld in many cases."—Sedg. & Wait, *Trial of Title to Lands*, § 271. See also *Jackson v. May*, 16 Johns. 184; *Winona v. Huff*, 11 Min. 119; *Cincinnati v. White*, 6 Pet. 431; *Dummer v. Jersey City*, 40 Amer. Dec. 213; *Hoboken Land Co. v. Mayor*, 36 N. J. (Law) 540; *Doe ex dem v. Booth*, 2 Bos. & Pul. 219; 3 Wait's Ac. & Def. 6, 7. In the following cases will be found a curious discussion, tending strongly to show that the road-bed and superstructure—in fact, every thing attached to the soil, on which a railroad is built—are considered realty.—*Randall v. Elwell*, 52 N. Y. 521 (s. c. 11 Amer. Rep. 747); *Hoyle v. P. & M. R. R. Co.*, 54 N. Y. 314 (s. c. 13 Amer. Rep. 595). And there is certainly much reason for the opinion. The road-bed and right of way are as immovable as the soil itself, the superstructure is attached to the soil, and the corporation has the exclusive right to the possession of it. In *Central Pacific R. R. Co. v. Benity*, 5 Sawyer, 118, the precise question we are considering was presented, and the court, Circuit Justice Sawyer participating, decided the action of ejectment would lie. So we hold it will lie in this case.

If it be contended for appellee that the Tennessee and Coosa Railroad Company is not shown to have ever acquired any right to the property sued for, shows no legal right to it, and therefore can not maintain this action, the answer is, the main defendant, on whose title all the defendants rely, acquired its possession and all the claim it asserts, derivatively from the plaintiff, and can not be heard to dispute its title.—Tyler on Ejectment, Ch. 9, p. 165; *Houston v. Farris*, 71 Ala. 570.

The East Alabama and Cincinnati Railroad Company obtained a charter for constructing a railroad, extending from Eufaula, in Barbour county, to Gunter's Landing, sometimes called Guntersville, on the Tennessee river, and in Marshall county. This company organized, and, proposing to obtain the State's indorsement of its bonds, executed to trustees a trust deed of all its property then owned, or afterwards to be acquired, to indemnify the State against loss by virtue of such indorsement. It issued its bonds, which, being indorsed by the State, were negotiated for funds with which to prosecute the construction of its road. The Tennessee and Coosa Railroad Company had previously obtained a charter for a railroad, extending from

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Gadsden, on the Coosa river, to Gunter's Landing, being in the route, and extending part of the distance from Eufaula to Gunter's Landing. This older company, extending from Gadsden to Guntersville, had surveyed and located its route, and had done some grading, masonry and other work along its line, but had laid no rails. Work was suspended for want of funds. At this stage of its progress, and after the said trust deed of the East Alabama and Cincinnati Railroad Company had been executed, an agreement of bargain and sale was entered into between the two corporations, by which the Tennessee and Coosa Railroad Company contracted to sell to the East Alabama and Cincinnati Railroad Company, its entire unfinished railroad, with all its property. That contract bears date July 12th, 1871. In the case of *Tennessee and Coosa Railroad Company v. East Alabama Railway Company*, 73 Ala. 426—a chancery suit—we construed that contract of sale, and held that the conditions in the contract are what are called precedent, and that the title to the railroad and its property, as between the contracting parties, did not pass by that instrument, by reason of the non-performance of the conditions. In that case, and in *Colt v. Barnes*, 64 Ala. 108, will be found a statement of many of the facts, which go to make up the history of this case.

In 1873, the East Alabama and Cincinnati Railroad Company was declared a bankrupt, assignees were appointed, and the property of the bankrupt was vested in them as such assignees. They sold the property to Murphy and others, and made them a deed of conveyance. Under this purchase, Murphy and his associate purchasers took possession of the property of the East Alabama and Cincinnati Railroad Company, and with it that portion of the Tennessee and Coosa Railroad which had been completed and was being operated by the bankrupt corporation, under its purchase of July 12th, 1871. They retained possession for two or more years, until dispossessed by the chancery suit of Barnes and Clews, trustees, to foreclose the trust deed given to secure the State and the bondholders. See *Colt v. Barnes*, 64 Ala. 108—the report of that case. Under that suit the entire effects of the East Alabama and Cincinnati Railroad Company were sold, and the appellee in this case—the East Alabama Railway Company—became the derivative purchaser, asserting title under said sale and purchase. The said purchasing company claims, as part of its said purchase, the property, road-bed, right of way and superstructure of the Tennessee and Coosa Railroad Company, and has had possession of it since said purchase; the actual possession being only of that section, extending from Gadsden to Attala.

In the suit by Barnes and Clews, trustees, to foreclose the trust deed, no special, separate mention is made of that section



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of the railroad track which was acquired from the Tennessee and Coosa Railroad Company, nor was the latter named corporation made a party to the suit. The defendant corporation purchased the entire property, road-bed, right of way, and every thing else belonging to the East Alabama and Cincinnati Railroad Company, and claims that the property in controversy in this suit is part of that property.

It is contended for appellee that, under the bankruptcy of the East Alabama and Cincinnati Railroad Company, the bankrupt court and its assignees took control and possession of the property in controversy, as of the assets of the bankrupt, that under a petition filed in that court for the purpose, the bankrupt's estate, including the property herein sued for, was sold and conveyed to Murphy and his associates, that they took possession under their purchase, and that plaintiff is barred under section 5057 of the Revised Statutes of the United States, because it did not prefer its claims within two years, and in that court.

The present record does not contain the petition filed by the assignees in the bankrupt court, under which they obtained the order of sale. The order of the district court, authorizing the sale, is in the record, and it recites the substance of the petition, and sets forth the parties to it. The recital is, that the assignees, naming them, were the petitioners, and that Barnes and Clews, the trustees in the deed of trust, were alone made defendants. They accepted service, and "consented to the hearing of said petition, and to a sale, as prayed therein, of the franchises and property of the said East Alabama and Cincinnati Railroad Company." The court thereupon ordered, "that the lien of the State of Alabama, and the mortgage or deed of trust of date July 1st, 1870, . . . to secure the State of Alabama against her indorsement of the first mortgaged bonds of said railroad company, and the holders and owners of said first mortgaged bonds, . . . be, and the same is hereby in all things recognized and established, as a prior lien on the franchise and property, real and personal, of said railroad company." The decree then directed a sale of said property, "subject to the prior lien aforesaid in favor of the State of Alabama, and the holders and owners of the first mortgaged bonds, . . . and that the entire road, its franchises and property, . . . be sold by said assignees, free from all other liens except the lien aforesaid in favor of the State of Alabama and the holders and owners of said first mortgaged bonds." The decree then directed that the sale be reported to, and the proceeds be brought into the court. Under this order, the East Alabama and Cincinnati Railroad, its franchise and property, were sold and conveyed to Murphy and his associates. This is the proceeding in which it is con-

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tended the Tennessee and Coosa Railroad Company should have intervened and asserted its claim, and failing to do so for two years, it is barred.

The authority of the assignee to sell the property of the bankrupt under the bankrupt law of 1867, may be reduced substantially to two methods: First, a sale without an order of court, in which case the assignee sells simply the unascertained interest of the bankrupt, leaving to the purchaser the right and duty of settling and determining all controversies as to disputed ownership, and all litigation that may grow out of such disputed ownership. Section 5063 of the Revised Statutes provides a second method. Its language is: "Whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any court. But this provision shall not prevent the recovery of the property from the possession of the assignee, by any proper action commenced at any time before the court orders the sale." It is manifest, from a perusal of this section, that it contemplates a sale of the entire property, and the entire title to it, freed from all conflicting claims and liens, and to place and leave its proceeds in its stead, as the subject of contention and litigation. Hence, it declares that its proceeds shall be considered the measure of its value, in any suit or controversy between the parties. How can such inquiry arise, or how can the question of value become material as a factor in adjusting conflicting claims, unless that value is ascertained by a sale of the entire title to the entire property? Sales under orders of court, granted under this section, are classed as sales free from incumbrance, because, no matter what may be the state of the conflicting claims and rights, the purchaser gets a good title, and leaves the contestants to litigate over the money proceeds. The order of sale in this case did not conform to section 5063 of the Revised Statutes, because it did not order the sale of the entire title. It simply ordered a sale of the residuum of ownership, beyond the prior lien and claim of the State and the bondholders under the first mortgage. There is no provision in the act of Congress for granting such order, and the consequence claimed as the result of such sale has no statutory ground to rest on. This entire system is the creature of statute, and can

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not be extended beyond its terms. There is no middle ground between the two methods of sale, the assignee is authorized to resort to. Again: To bring a case within section 5063, Revised Statutes, the order of sale can only be granted, *after such notice to the claimant as the court shall deem reasonable*. In this case there was not only no notice to the claimant, the Tennessee and Coosa Railroad Company, but its very existence was ignored in the proceedings. Notice was indispensable, as declared in many courts of the highest authority, and, among them, many rulings of the United States Supreme Court.—*Ray v. Norseworthy*, 23 Wall. 128; *Stickney v. Wilt*, *Ib.* 150; Bump on Bankruptcy (10th Ed.), 619–20. As was said in *Glenny v. Langdon*, 98 U. S. 20, 31, “neither the assignee nor any creditor can have any greater right under the bankrupt act, than the act itself confers.” And in *Yeatman v. Savings Institution*, 95 U. S. 764–6, it was said: “Except in cases [enumerated, but this is not one of them], the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law, or by act of the bankrupt, which existed against the property in the hands of the bankrupt.”—*Stewart v. Platt*, 101 U. S. 731; *Dudley v. Easton*, 104 U. S. 99; *Rhodes v. Blackiston*, 106 Mass. 334 (s. c. 8 Amer. Rep. 332); *Shaw v. Lindsey*, 60 Ala. 344.

In the chancery suit between these parties, 73 Ala. 426, we showed that by failure to perform conditions precedent, the East Alabama and Cincinnati Railroad Company never acquired title to the Tennessee and Coosa Railroad. We showed further, that by the bankruptcy of the former corporation, it had become unable to comply with its contract, and thus acquire the title. It was therefore in possession by no title, legal or equitable. In this condition the claim of the bankrupt, if claim there was, devolved on the assignees. “If . . . the property has not been conveyed in fraud of creditors, he [the assignee] has no greater interest in or better title to it than the bankrupt.”—*Donaldson v. Farwell*, 93 U. S. 631. Having gone into possession under an executory contract of purchase, the East Alabama and Cincinnati Railroad Company was estopped from disputing the title of the plaintiff corporation; and the assignee, standing in the bankrupt's shoes, was equally estopped. And both the bankrupt and the assignees being in by no right, we are at a loss to know how the East Alabama Railway Company, which is in no way connected with that possession, and derives no title from the assignees, can claim any benefit therefrom.—*Wilson v. Glenn*, 68 Ala. 383.

There is another view. Section 5057 of the Revised Statutes applies the two years bar to suits “touching property or rights of property transferable to, or vested in the assignee.”



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It extends no farther. The bankrupt corporation having no property, or right of property in the subject of this suit, it neither vested in, nor was it transferable to the assignees.—*Porter v. Lazear*, 109 U. S. 84.

The plaintiff can recover only to the extent the defendant is shown to have occupied its previously located road-bed and right of way.

The judgment of the circuit court is reversed, and the cause remanded.

BRICKELL, C. J., not sitting.

## Avery & Sons v. Lockhard.

### *Garnishment.*

1. *Garnishment; what debts may be subjected by.*—The established rule is, that, in the absence of fraud, only such demands can be subjected by process of garnishment as the defendant, in his own name, could recover from the garnishee in an action of debt, or *indebitatus assumpsit*.

APPEAL from Sumter Circuit Court.

Tried before Hon. S. H. SPROTT.

B. F. Avery & Sons, a corporation, having commenced suit by summons and complaint against E. & T. E. Lockhard, on the same day sued out a writ of garnishment against W. T. Abrahams, as debtor to the defendants. The garnishee was discharged on his answer, the material averments of which sufficiently appear in the opinion.

The judgment of the court discharging the garnishee is here assigned as error.

HEAD & BUTLER, for appellant.

J. J. ALTMAN, *contra*.

SOMERVILLE, J.—The established rule is, that in the absence of fraud, only such demands can be subjected by process of garnishment as the defendant, in his own name, could recover from the garnishee in an action of debt, or *indebitatus assumpsit*.—*Henry v. Murphy & Co.*, 54 Ala. 246; 1 Brick. Dig. p. 175, § 315.

This test is, in our opinion, fatal to the contention made by the appellants. The uncontroverted facts disclosed by the gar-

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nishee's answer show that the debt due by him to the defendants, E. & T. E. Lockard, had been transferred to Abrahams, as assignee, for the benefit of the partnership creditors. This claim, it is true, was excepted from the general assignment made by the Lockards on the 21st of April, 1881, but it was so excepted, very obviously, in order that it might be claimed as exempt for the *individual benefit* of T. E. Lockard. This appears from the terms of the assignment itself, and the clear intent of the parties, as between themselves, was, that the interest of E. Lockard in this claim should pass to T. E. Lockard. Whether, if this had been permitted to stand, it would have been held valid against the assault of partnership creditors, it is unnecessary to decide.—*Mayer v. Clark*, 40 Ala. 259; *Giovanni v. First National Bank*, 55 Ala. 305. It is sufficient that, before the service of the garnishment on Abrahams, who was both the garnishee and the trustee under the deed of assignment made by the Lockards for the benefit of their partnership creditors, it is made to appear that T. E. Lockard verbally transferred the claim in dispute to the same trustee for the benefit of the same creditors. Under these circumstances, neither the firm of E. & T. E. Lockard, nor either of them individually, could have brought an action for the debt and recovered it.

The circuit court so ruled, and its judgment is affirmed.

## **Banks et al. v. Thompson.**

*Bill in Equity by the Wife to enforce Trust in Lands purchased by the Husband with Moneys belonging to her Statutory Separate Estate.*

1. *Equity of wife in lands purchased by the husband with her money; when inferior to execution lien of judgment creditor.*—Where the husband invests money belonging to his wife, as her statutory separate estate, in lands, and takes the title in his own name, the equity of the wife to charge the lands with the moneys so invested is inferior and subordinate to the lien of a judgment creditor of the husband under an execution issued on the judgment, when, at the time the lien was acquired, the creditor had no notice, actual or constructive, of the wife's equity.

2. *Lis pendens as constructive notice.*—It is settled in this State, that to constitute *lis pendens* constructive notice of claim or asserted ownership, not only must the suit be instituted, but process must be issued and served.

3. *Same.*—Hence, the mere filing of a bill in equity by a wife against her husband alone, seeking to charge lands purchased by, and conveyed to him, with a trust for moneys belonging to her as part of her statutory

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separate estate, which he had invested in the lands, does not operate as constructive notice of the wife's equity to a judgment creditor of the husband, who had acquired a lien on the lands by issue of an execution prior to service on the husband.

APPEAL from Russell Chancery Court.

Heard before Hon. JNO. A. FOSTER.

The facts are sufficiently stated in the opinion.

J. B. MITCHELL and WATTS & SON, for appellants.

L. W. MARTIN, *contra*.

STONE, J.—Banks obtained judgment against Charleton Thompson, and an execution thereon was placed in the hands of the sheriff of the county in which the lands lie, on the 16th day of June, 1882. Under this execution the lands in controversy were levied on and sold, and Banks became the purchaser, receiving the sheriff's deed. The lands thus sold and conveyed are the south-east quarter of section 35, township 14, range 26, in Russell county, less a strip 35 yards wide, extending across the southern part of the tract. The title of the lands was in Charleton Thompson when the sheriff received the execution, and when he sold. With this tract he had acquired, and still owned the north-east quarter of the same section. The last named quarter he had claimed, and it had been set apart to him as his homestead exemption.

On the same day on which the execution went into the hands of the sheriff—June 16th, 1882—Jane Thompson, wife of Charleton Thompson, filed the present bill against her husband, in which she alleged that a part of her money, her statutory separate estate, had been invested by her husband in the purchase of said lands; and she sought to fasten a lien on the lands, to repay to her the money so alleged to be invested. Charleton Thompson was alone made defendant to the original bill, and summons to answer was served on him July 1st, 1882. The present record contains neither averment nor proof that Banks had notice of Mrs. Thompson's asserted lien, until long after his execution lien had attached. Hence, unless her suit gave him constructive notice, his equity is paramount to hers. *Preston v. McMillan*, 58 Ala. 84, 94.

It has been long settled in this State, and we have no desire to depart from it, that to constitute *lis pendens* notice of claim, or asserted ownership, not only must the suit be instituted, but process must be issued and served.—*Doe ex dem v. Magee*, 8 Ala. 570; *Hoole v. Attorney General*, 22 Ala. 190; *Center v. P. & M. Bank*, *Id.* 743; *Goodwin v. McGehee*, 15 Ala. 232.



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Banks had no notice of Mrs. Thompson's equity in time to intercept his lien.

The decree of the chancellor is reversed, and a decree here rendered, dismissing complainant's bill, so far as it prays relief against W. H. Banks, and against the south-east quarter of section 35, township 14, range 26, east. In all other respects it is undisturbed. Let the costs of appeal be paid by appellee.

Reversed and rendered.

## Ballentyne v. Wickersham.

### *Action for Malicious Prosecution.*

1. *Provision of Art. 4, § 2 of Constitution mandatory; how construed.* The provision of section 2, Art. 4, of the Constitution of this State, ordaining that "each law shall contain but one subject, which shall be clearly expressed in the title," is mandatory; but its requirements are not to be exactly enforced, or in such manner as to cripple legislation.

2. *Same.*—Under this clause of the Constitution, the title of a bill may be very general, and need not specify every clause in the statute, it being sufficient if they are all referable and cognate to the subject expressed; and when the subject is expressed in general terms, every thing which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in, and authorized by it. But if clauses are contained in the act which are not so correlated to the subject expressed in the title, as to appear to follow as a natural and legitimate complement, they can not stand.

3. *Same.*—The constitutional inhibition is as emphatic, that a statute shall not embrace more than one subject, as is the mandate, that that subject shall be clearly expressed in the title; and hence, a statute embracing two subjects, both of which are expressed in the title, falls within the inhibition, and is unconstitutional and void.

4. *Same; act establishing an Inferior Court of Criminal Jurisdiction for Mobile County, etc., unconstitutional.*—The act approved February 12th, 1879, entitled "An act to establish an Inferior Court of Criminal Jurisdiction for the County of Mobile, and to define the jurisdiction of said court, and the criminal jurisdiction of justices of the peace in said county" (Pamph. Acts, 1878-9, p. 111), expresses in the title, and contains in the body thereof, two subjects, each distinct from, and independent of the other, in violation of the constitutional inhibition; and hence, it must be pronounced void, no part of it having been constitutionally enacted.

5. *Walker v. Griffith, 60 Ala. 361, doubted.*—The argument by which the conclusion was reached in the case of *Walker v. Griffith*, 60 Ala. 361, declared to be unsound, and not to be followed.

6. *Inferior Criminal Court of Mobile, not established by amendatory act of February 23rd, 1881.*—The amendatory act of February 23rd, 1881, did not and could not give validity to the original act (act of February 12th, 1879), except to the extent it re-enacted the provisions of the older enactment; and, thus interpreted, it is fatally incomplete, and did not

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establish the "Inferior Criminal Court of Mobile," the name thereby given to the court intended to have been established by the original act.

APPEAL from Mobile Circuit Court.

The name of the presiding judge not disclosed by the record.

This action was commenced on 4th June, 1881, by Hamilton Ballentyne against Morris D. Wickersham, to recover of the defendant damages "for maliciously, and without probable cause therefor, causing the plaintiff to be arrested on a charge of libel." The defendant pleaded, among other things, in substance, that the plaintiff having published and circulated certain libelous and defamatory matter of and concerning the defendant, the latter sued out a warrant of arrest, on affidavit, against the plaintiff before the criminal justice of Mobile county, charging him with libel and defamation, under which he was arrested; and that afterwards the plaintiff appeared, and was tried and convicted of said offense in the Inferior Criminal Court of Mobile before the said criminal justice, and by him duly sentenced. It is also averred "that the said justice had jurisdiction of said cause." The opinion does not require a fuller statement of the averments of this plea. To this plea the plaintiff demurred, on the ground that said justice had no jurisdiction or authority to issue said warrant, or to try said cause, or to render final judgment therein. The court overruled the demurrer, and the cause was tried on issue joined on this and other pleas, the trial resulting in a verdict and judgment for the defendant.

The ruling of the court above noted is here assigned as error.

JAMES COBBS, for appellant, cited on the point decided by the court, 66 Ala. 495; 42 Texas, 384; 41 *Ib.* 405; 34 *Ib.* 74; Cooley on Con. Lim. 141-7.

J. L. & G. L. SMITH, *contra*, cited, on same point, *Block v. The State*, 66 Ala. 493; *Woodson v. Murdock*, 22 Wall. 373; *Ex parte Moore*, 62 Ala. 471; *Walker v. Griffith*, 60 Ala. 361; *City of St. Louis v. Tiefel*, 42 Mo. 589; 2 Iowa, 280; 11 Texas, 673; Cooley on Con. Lim. p. 141; *State ex rel. v. McLaughlin*, (S. C. Mo.), Cent. Law Journ. Vol. 14, No. 23, p. 454.

STONE, J.—On February 12th, 1879, the act was approved "To establish an Inferior Court of Criminal Jurisdiction for the County of Mobile, and to define the jurisdiction of said court, and the criminal jurisdiction of justices of the peace in said county."—Pamph. Acts, 1878-9, p. 111. The first fourteen

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sections of the act are devoted to the subject of a criminal justice of Mobile county, declaring his jurisdiction and powers, and providing machinery for their exercise. The fifteenth section repeals or takes away all criminal jurisdiction, and *quasi* criminal jurisdiction of all other justices of the peace and notaries public, commissioned for the municipality, known as "the Mayor and Aldermen and Common Council of the City of Mobile;" leaves them conservators of the peace, but with civil jurisdiction only, so far as the right to hear and determine is concerned.

Section 16 of the act declares, "That justices of the peace within the county of Mobile, and outside of the limits described in the preceding section [the limits of the city of Mobile], in addition to the jurisdiction and powers now conferred by law, shall also have jurisdiction of horse-racing on the public roads, and also of offenses described in sections 4199, 4200, 4219, 4220, 4221, 4405, 4406 of the Code"—disturbing religious worship, disturbing females at public assemblies, etc., selling tainted or diseased meat, selling unwholesome bread, adulterating sugar, syrup or molasses, owning or having in possession sheep-killing dogs, hunting wild hogs. A considerable increase of criminal jurisdiction.

This statute, by its original enactment, and by its modification of laws then existing, provided for three classes of officers of inferior jurisdiction: First, a criminal justice of Mobile county—an officer, and with jurisdiction theretofore unknown. Second, it reduced the jurisdiction of all other justices of the peace in the corporate limits of the city of Mobile, to matters purely civil, and of private grievance. Third, it increased very materially the criminal jurisdiction of all justices of the peace in Mobile county, outside of the limits of the city of Mobile.

It was contended for the plaintiff in the court below, and the contention is renewed here, that this enactment violates the second section of the fourth article of the Constitution, which ordains that "each law shall contain but one subject, which shall be clearly expressed in its title," with certain exceptions, of which this is not one. The position taken is, that the title of this statute contains two subjects, and the body of the enactment three.

Constitutional limitations, similar to ours copied above, are found in many of the later State Constitutions, and in most of the States, as in this, it is declared to be mandatory. The abuses which called the provision into existence are clearly understood, and are twofold. Each subject introduced before the legislative department shall be considered and voted on singly, without associating with it any other measure to give it strength. Experience had shown that measures, having no common purpose,



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and each wanting sufficient support on its own merits to secure its enactment, have been carried successfully through legislative bodies, and become laws, when neither measure could command the approval of a majority of that body. In common parlance, this is called log-rolling, and this the constitutional provision intended to interdict.

There was a second abuse, against which this provision was levelled. The subject of the act "shall be *clearly expressed* in the title." The intention of this was, that the title of the act or bill should inform the members of the legislature, and perhaps the public, of the subject on which the former were invited to vote and legislate. Matters foreign to the main objects of the bill had sometimes found their way into bills—surreptitiously, at times, it was charged—and thus the members were induced to vote for measures in ignorance of what they were doing. The constitutional provision intended to render a continuance of this abuse impossible.

There have been many rulings on constitutional clauses, similar to the one we are considering. And, as is usual in such cases, judges have differed in their interpretation. This court has committed itself in favor of the following propositions, which are in harmony with the rulings elsewhere in the best considered cases:

That the clause is mandatory.

That its requirements are not to be exactly enforced, or in such manner as to cripple legislation.

That the title of a bill may be very general, and need not specify every clause in the statute. Sufficient if they are all referable, and cognate to the subject expressed. And when the subject is expressed in general terms, every thing which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in, and authorized by it. *Weaver v. Lapsley*, 43 Ala. 224; *Walker v. The State*, 49 Ala. 329; *Lockhart v. City of Troy*, 48 Ala. 579; *Woodson v. Murdock*, 22 Wallace, 351; *State ex rel. v. Squires*, 26 Iowa, 340; *Cannon v. Mathes*, 8 Heisk. 504; *State of Mo. v. Miller*, 45 Mo. 495; *Chiles v. Drake*, 2 Mete. (Ky.) 146; *Keller v. The State*, 11 Md. 525; *Simpson v. Bailey*, 3 Oregon, 515; *Lafon v. Dufrocq*, 9 La. An. 350. In *Division of Howard Co.*, 15 Kan. 194, it was said: "The 'subject' to be contained in a bill under section 16, article 2 of the Constitution, which provides that 'no bill shall contain more than one subject, which shall be clearly expressed in its title,' may be as broad and comprehensive as the legislature may choose to make it. It may include innumerable minor subjects, provided all these minor subjects are capable of being so combined as to form only one

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grand and comprehensive subject ; and if the title of the bill, containing this grand and comprehensive subject, is also comprehensive enough to include all these minor subjects as one subject, the bill and all parts thereof will be valid." This language, it seems to us, is eminently just and proper. See also *Wenzler v. People*, 58 N. Y. 516 ; *Shields v. Bennett*, 8 W. Va. 74 ; *McGunnigle v. McKey*, 77 Pa. St. 81 ; *Single v. Supervisors*, 38 Wis. 363.

In *Dorsey's appeal*, 72 Penn. St. 192, the contention arose between mechanic's claim creditors, and judgment creditors. The lands were freehold. The title of the act, under which the mechanics claimed, was "An act relating to the liens of mechanics, material-men and laborers upon leasehold estates and property thereon, in the county of Venango." One section of the act extended the lien to a freehold estate. Its language, declaring the lien, is "on the ground of the owner necessary for the useful purposes of the buildings." The court, Agnew, J., said : "Reasons might be given why leaseholds should be subjected to a lien for work and materials, when a freehold would not be. The former are often of short duration, and engines, derricks, machinery, and even buildings may be removed therefrom during the term. But it is sufficient that the legislature has, by the title of the act, clearly confined the lien to leaseholds. This description, *ex vi termini*, excludes estates of a higher grade. The second amendment to the Constitution, adopted in 1864, provides that 'no bill shall be passed by the legislature, containing more than one subject, which shall be clearly expressed in the title, except appropriation bills.' The word, 'subject,' has a large signification, often embracing different kinds, different classes, and various modes, all belonging to the general subject. The word *estates* is itself an example, embracing fees, fee tails, estates for life, and estates for years, commonly called leaseholds. Had the qualifying term, 'leaseholds' been omitted in this title, all the various kinds of estates of freehold would have been comprehended within the title, and the sale of a freehold interest under the lien would have been good. Mere generality of meaning in the title ought not to avoid a law." The section relating to freeholds, was declared unconstitutional, because it was neither expressed, nor comprehended within the title.

In the *People v. Allen*, 42 N. Y. (3 Hand) 404, the title of the act was, "An act to incorporate the Schenectady Astronomical Observatory." One clause of the statute directed the comptroller to loan to the corporation sixty thousand dollars of the capital of the common school fund. The comptroller refused to make the loan, and *mandamus* was prayed for to compel him to do so. The Court of Appeals, reversing the

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rulings of the lower courts, held that the subject of this loan not being expressed in the title of the act, that clause was in violation of the Constitution, which provided that private and local bills should relate to but one subject, which should be expressed in the title.

The Constitution of Kentucky provides that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." The legislature passed an act with the following title: "An act to amend the second section of article sixty-three of the Revised Statutes, entitled limitations of actions and suits." In *Chiles v. Monroe*, 4 Metc. (Ky.) 72, the court said: "The title refers exclusively to the second section of the chapter on limitations. The subject (and only subject) of that section is the limitation of actions for the recovery of real property. But the act, which, according to its title, purports to amend but a single section of the chapter, is very much broader, and comprehends and operates upon almost every section of the entire chapter. The title is, therefore, misleading and delusive, affording no indication whatever of some of the subjects to which the act relates." The court ruled that the case was clearly within the letter and policy of the constitutional inhibition.—*Mewherter v. Price*, 11 Ind. 199; *Igoe v. State*, 14 Ind. 239; *People v. McCann*, 16 N. Y. 58; *Huber v. People*, 49 N. Y. 132; *Matter of Lands in Town of Flatbush*, 60 N. Y. 398; *Ex parte Hogg*, 36 Tex. 14; *Ex parte Conner*, 51 Ga. 571; *Brieswick v. Mayor*, *Ib.* 639; *State v. Shadle*, 41 Tex. 404; *People v. Denahy*, 20 Mich. 349; *Block v. State*, 66 Ala. 493.

The following cases appear to go to the ultimate verge in holding legislative provisions unconstitutional, on the ground that they were not embraced in the title.—*Parish of Bossier v. State*, 13 La. An. 433; *Foley v. The State*, 9 Ind. 363; *Cutlip v. Sh'ff of Calhoun Co.*, 3 W. Va. 588; *City San Antonio v. Gould*, 34 Tex. 49; *Smails v. White*, 4 Neb. 353.

And the following cases seem to touch the outside limit in the other direction.—*Williams v. State*, 48 Ind. 306; *Prescott v. City of Chicago*, 60 Ill. 121; *Kurtz v. People*, 33 Mich. 279; *Morton, Bliss & Co. v. Comptroller*, 4 S. C. 430; *Denham v. Holeman*, 26 Ga. 182. Our own case of *Walker v. Griffith*, 60 Ala. 361, can not be extended, without a virtual repeal of the constitutional provision. The argument, by which the conclusion in that case was reached, is unsound, and can not be followed. Whether the one subject was not the mere complement of the other, so connected with it as to constitute but one subject in fact, we need not now inquire. *Luehrman v. Taxing District*, 2 B. J. Lea (Tenn.) 425.

We approve, and adopt as our own, the following language



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of the Supreme Court of Minnesota, in *State ex rel. v. Kinsella*, 14 Min. 524: "The exigencies of legislation require that this provision should not be so strictly [literally?] construed as to cripple the legislature, by prohibiting the insertion into laws of those matters which, though they may not be specifically expressed in the title, are proper to the full accomplishment of the object so expressed; such is presumed to have been the intention of its authors. Courts, therefore, give it a liberal construction. The insertion in a law of matters which may not be verbally indicated by the title, if suggested by it, or connected with, or proper to the more full accomplishment of the object so indicated, is held to be in accordance with its spirit; but a more liberal construction can not be given, without letting in the evils which the provision was intended to exclude." We may add, that if the questioned clause, or clauses, be not so correlated to the subject expressed in the title, as to appear to follow as a natural and legitimate complement, then they can not stand under the clause of the Constitution under discussion.

But suppose a statute embraces two subjects, and both are expressed in the title. Is that in compliance with the constitutional requirement? Clearly not. The constitutional inhibition is as emphatic that a statute shall not embrace more than one subject, as is the mandate that that subject shall be clearly expressed in the title. If it were not, the greatest of the evils intended to be guarded against—legislative log-rolling—would be left unredressed. This precise question arose under a statute of the State of Louisiana, the title of which was, "An act relative to slaves and free colored persons." The whole act was declared unconstitutional, because both the title and the body of the act embraced more subjects than one.—*State v. Harrison*, 11 La. An. 722.

The first, and most important part, alike of the title and the body of the act we are considering, establishes an inferior court of criminal jurisdiction for the county of Mobile, and defines the jurisdiction thereof. This court was created and established under article 6, section 1 of the Constitution, which empowered the General Assembly, from time to time, to establish "inferior courts of law and equity, to consist of not more than five members."—§ 13. "The judges of such inferior courts of law and equity, as may be by law established, shall be elected or appointed in such mode as the General Assembly may prescribe." The act then proceeded to create the office of "criminal justice of Mobile county," to be elected by the qualified voters of the county at the general election in August, 1880, and to hold office for six years. And, until said first election, the governor was authorized to appoint some duly qualified

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person to said office. The person elected such criminal justice was to be "learned in the law." He was required to give bond in the sum of three thousand dollars, and to "hold his office in the city of Mobile, in a building or room to be provided and furnished by the commissioners court of Mobile county, with suitable furniture, fuel, lights, books, and stationery, in the same manner as in the City Court of Mobile." The statute confers on such criminal justice large criminal jurisdiction, but no civil jurisdiction; empowers him to punish by imprisonment or hard labor for the county, and constitutes his court a court of record, with a seal; declares that said court shall be open at all times, except on Sundays and legal holidays; and makes it the duty of the solicitor of Mobile county to appear before the said court and prosecute, when requested by said criminal justice, unless engaged in the city or circuit court. Said criminal justice is a salaried officer. The act also creates a marshal and deputy marshal, to be appointed by such criminal justice, with fixed monied salaries. The act contains many details, not necessary to be noticed here. It will be seen, in what is enumerated above, and more fully by an examination of the statute, that this criminal court of inferior jurisdiction is a judicial tribunal of very considerable importance.

Under the first clause of the caption of this act, we think the provisions of section 15 may be considered as properly embraced. They are cognate to the subject of the Inferior Criminal Court for Mobile County, and were necessary to the complete accomplishment of the purposes of this act, in creating a court of inferior criminal jurisdiction. They are not alien to the subject.

The second clause of the title to this act, is "to define . . . the criminal jurisdiction of justices of the peace in said county." The officers known as justices of the peace are provided for by name in section 26 of article 6 of the Constitution. They are elected by the qualified electors of the precinct for which they are chosen, and have certain civil jurisdiction. All this the Constitution prescribes. By statute their term of office is fixed at four years, and they have criminal jurisdiction much less extensive than that of the criminal justice of Mobile county. They have no salaries, and their courts are not courts of record. Many other differences might be pointed out between their office and official functions, and those of the criminal justice. Section 16 of the act increases very materially the criminal jurisdiction of justices of the peace within the county of Mobile, and outside of the corporate limits of the city. It is confined to that subject alone. The subject of that section is clearly expressed in the second clause of the title of the act. Is it expressed, or comprehended within the first clause? To test this,



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let us suppose the title of the act had expressed but one of the two clauses. Take the first, which authorizes the establishment of an inferior court of criminal jurisdiction. Would any one contend that under such title, the criminal jurisdiction of justices of the peace within the county of Mobile, and outside of the city limits could be enlarged? There would be no natural connection between the two subjects, or dependence of one upon the other. The increase of the criminal jurisdiction of the justices of the peace could not in the least contribute to the power, jurisdiction, or official functions of the court of the criminal justice of Mobile county. Take the second clause—to define the criminal jurisdiction of justices of the peace in said county. No one would contend that under such title, an independent court of record, called an inferior court of criminal jurisdiction, and exercising large powers and jurisdiction, such as the statute confers on this court, could be established under it. Now, the two clauses of the title are so distinct from, and independent, each of the other, that neither aids the other, contributes to its full accomplishment, or makes up the complement of what would otherwise be incomplete; and it follows irresistibly that both the title and the body of the act contain two subjects, and the act must be pronounced a failure, because no part of it was constitutionally enacted.

We do not affirm, in what is said above, that a title could not be framed, general enough and broad enough to embrace the whole scope of the act.—*Rogers v. Torbut*, 58 Ala. 523. All we decide is, that the legislature chose to express a minor subject, which was not broad enough to cover the entire contents of the act, and hence, they felt called upon to express two minor subjects. This case is not distinguishable in principle from *Dorsey's case*, 72 Penn. St., *Chiles v. Monroe*, 4 Metc. Ky., and *State v. Harrison*, 11 La. An., each of which is commented on above.

The statute we have had under consideration was amended by act approved February 23rd, 1881.—Pamph. Acts 257. The amendatory act did not and could not give validity to the original act, except to the extent it re-enacted the provisions of the older enactment. Thus interpreted, the later statute is fatally incomplete, and did not establish "The Inferior Criminal Court of Mobile." Notably, it fails to provide any mode of electing or appointing a criminal justice to preside in said court, not to mention many other fatal imperfections.

We deeply regret the conclusion we feel forced to announce in this case. We have no doubt "The Inferior Criminal Court of Mobile" was a very useful, and much needed tribunal. The predatory warfare, misnamed judicial administration, sometimes waged in cities against public repose, and especially against the



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too confiding, ignorant members of society, has sometimes brought reproach on what should be one of the highest functions of government. But we know not how to surmount constitutional barriers. We close this opinion with a quotation from *Prothro v. Orr*, 12 Ga. 36-40, opinion by Lumpkin, J.: "We approach this subject with reluctance, not only because the duty itself is one, at all times, of great delicacy, but we can not shut our eyes to the fact, that, owing to the haste of our legislation, many of our statutes will be found, we fear, upon close scrutiny, to be obnoxious to the same objection. But when the question is, whether we shall maintain a statute, or the Constitution, which is the paramount law, and which we are constrained by our oath of office to support and defend, we can not hesitate. We must maintain conscience void of offense, whatever we do, or omit to do. I am aware of the importance of adhering to decisions, once solemnly made. It has been truly said that a greater evil can scarcely attend a court, than that the decisions of such a tribunal should be unstable and fluctuating. There is, however, a greater evil than this, and that is, to forfeit one's self-respect by committing deliberate perjury in the sight of high heaven."

There is another constitutional question raised in this case, which, in future legislation, it would be well to guard against. The Constitution, section 13 of the Declaration of Rights, declares "that in all indictments for libel, the jury shall have the right to determine the law and the facts, under the direction of the courts." The argument is, that inasmuch as the Court of Inferior Criminal Jurisdiction of Mobile is made the judge of law and fact, and has no jury, jurisdiction of any prosecution for libel, whether under indictment or warrant of arrest, can not constitutionally be conferred on that court. We merely state the question, to call attention to it, without intending to intimate an opinion upon it.

The judgment of the circuit court is reversed, and the cause remanded.

BRICKELL, C. J., dissenting.

[Ex parte Haralson & Co.; Ex parte Kelly & Howze.]

## ***Ex parte Haralson & Co.; Ex parte Kelly & Howze.***

### *Mandamus.*

1. *Contest of exemption; right of amendment; mandamus.*—A plaintiff in attachment having contested a claim of exemption made by the defendant to personal property levied on, and the defendant not executing a bond under sections 2836 and 2942 of the Code, on the plaintiff executing bond, approved by the sheriff, the property was delivered to him, and by him placed in the hands of his attorneys, who still hold it, or its proceeds. The bond having been quashed on motion of defendant, based on the ground that it was defective, the plaintiff moved for leave to file a new and sufficient bond. The court overruled this motion, and ordered that the defendant be allowed five days in which to give bond and take possession of the property, and, on his failure to do so, that the plaintiff be allowed five days within which to give bond; and that the plaintiff's attorneys pay and turn over to the clerk of the court the money and property in their hands, to abide the further orders of the court, to be made in the premises. *Held,*

(a) That the defendant, in his motion to quash plaintiff's bond having failed to assign as a ground therefor, that he had not been allowed, in the first instance, the five days allowed by statute in which to give bond and take possession of the property, the presumption is, under the facts in this case, that the time was allowed him, and that he failed to give the bond.

(b) That the court should have allowed the plaintiff to give a new and sufficient bond; and that it erred in allowing defendant five days in which to give bond, and in ordering the plaintiff's attorneys to pay and turn over to the clerk the money and property in their hands.

(c) *Mandamus* ordered by this court, commanding the primary court to vacate and set aside the order made by it, and to make an order allowing the plaintiff to file an amended bond under sections 2836 and 2943 of the Code of 1876.

APPLICATIONS to this court for writ of *mandamus* to Hon. JOHN MOORE, Judge of the First Judicial Circuit, presiding at Perry Circuit Court.

The facts are sufficiently stated in the opinion.

WM. M. BROOKS and KELLY & HOWZE, for petitioners.

JOHN F. VARY, *contra*.

STONE, J.—These cases are so connected, and dependent one upon the other, that we will consider them together.

These cases arose out of a contested claim of exemption, which had been interposed under section 2834, Code of 1876.

[Ex parte Haralson & Co.; Ex parte Kelly & Howze.]

Haralson & Co. and other creditors had sued out attachments against one Farrell, which were levied on a stock of merchandise. Farrell thereupon interposed his claim in writing under oath, that one thousand dollars in value of the merchandise was exempt to him, he being a resident of the State. This claim was lodged with the sheriff, who notified plaintiffs in the several attachments. Plaintiffs thereupon filed their affidavit, through their attorney, stating that "in the belief of affiant said claim of exemption is [was] invalid entirely." Defendant in the attachments executed no bonds, as authorized by sections 2836 and 2942 of the Code, but the several plaintiffs in attachment executed bonds, which were approved by the sheriff, who thereupon turned over the goods, so claimed and contested, to the attaching plaintiffs. The goods were then placed by plaintiffs in the hands of their attorneys, who, at the time these proceedings were had in the circuit court, still held them, partly in money and partly in merchandise.

Motion was made in the court below to quash the bonds plaintiffs had given under sections 2836, 2943 of the Code. The bonds were defective in more respects than one, and the circuit court rightly quashed them. Plaintiffs in the attachments thereupon moved the court for leave to file new and sufficient bonds. This motion the court overruled, and ordered that the claimant of the exemptions be allowed five days within which to give bond, and take possession of the property in controversy; and failing, that then plaintiffs in attachment be allowed five days within which to give bonds. The court further ordered that the attorneys of plaintiffs pay and turn over the property and money deposited with them to the clerk of the court, to abide further orders to be made in the premises.

It is argued here, against the relief prayed, that the sheriff did not allow to the claimant of exemptions five days within which to give bond, after he was notified his claim had been contested; and that the plaintiffs' informal bonds were given and approved, in less than five days after such notice.—Code, 1876, § 2836. In this way it is urged that the claimant of exemptions has never had the five days in which to make bonds, allowed him by the statute. It is a sufficient answer to this, that the motion to quash was in writing, stating several grounds, and this is not one of them. Had this ground existed in fact, it is but reasonable to infer it would have been assigned. The attention of the court was not called to it, and we can not presume it could not have been met if raised. The affidavit of contest was filed with the clerk November 26, and the bond of plaintiff was approved December 5th. This is nine days. It was the duty of the sheriff to give notice within three days after contest filed. If he did this, there were then at least six days be-



[Ex parte Haralson & Co.; Ex parte Kelly & Howze.]

fore plaintiff's bond was accepted and approved. It is urged, however, that the sheriff's return proves when he gave the notice, and that it was not until December 3rd. We think it doubtful whether this date was intended to note when he served the notice, or when he returned the papers to the clerk. The silence of the motion on this subject tends to confirm the latter view. The objection is not well taken.

Our whole judicial system has been framed with a view to meting out substantial justice, to the discouragement of mere technical objections, which only tend to thwart its wholesome aims. To this end, we have, from an early day, encouraged and built up a generous system of amendments, so liberally applied that, with few exceptions, errors even in original process can be amended, and in mesne, or intermediary proceedings, we know no boundary to the right to correct errors and remedy mistakes, when the ends of justice, or an early trial on the merits will be promoted thereby.—*Drinkwater v. Holiday*, 11 Ala. 134; *Taylor v. Br. Bank at Huntsville*, 14 Ala. 633; *Ex parte Morgan*, 30 Ala. 51; *Webb v. Kelly*, 37 Ala. 333. The circuit court should have allowed the contesting plaintiffs to give new and sufficient bonds.

There was appearance and answer for the presiding judge in the court below, and a common desire expressed that final orders be now made in these causes.

On the petition of Haralson & Co. *et al*, it is ordered and adjudged that the writ of mandamus issue to the judge presiding in Perry circuit court, commanding and requiring him to vacate and set aside the order made, granting to Farrell, claimant of exemption, leave to execute a bond under §§ 2836, 2942 of the Code, and to make an order allowing Haralson & Co. to file an amended bond under §§ 2836, 2943 of the Code, in the penalty and condition prescribed by law. This order applies to each of the petitioning attachment creditors.

On the petition of Kelly & Howze, it is ordered and adjudged that a like writ issue to said presiding judge, commanding and requiring him to set aside and vacate the order heretofore made, directing them to pay and turn over to the clerk of the court the money and merchandise claimed as exempt, a contest of which claim is now pending.

## Price, Ex'rx, v. Carney.

*Bill in Equity by Attorneys to enforce Trust in Funds in Hands of Sheriff, created by Contract with Clients, and to cancel Releases obtained from Clients by Sureties on Official Bond of Sheriff.*

1. *Champerty; when contract between attorneys and clients not tainted with.*—A contract between parties to two litigated attachment suits and their attorneys is not champertous, which, settling and adjusting all matters of controversy between the parties to the suits, provides that judgments should be rendered for one-half of the proceeds of property which had been levied on and sold under the attachments, and then in the hands of the sheriff; that designated parts of the fund, when collected, should be paid to the plaintiffs, and the balance divided, in stated proportion, between the attorneys of the parties, plaintiff and defendant, as compensation to them for services rendered in the suits and in other controversies between the parties, and to be rendered in the prosecution of suits for the recovery of the fund from the sheriff, or his sureties; and that one of the attorneys should have the control of the judgments, and of the fund to be realized from the sheriff, or his sureties, until the agreement has been fully executed.

2. *When authority of attorney to execute contract for client can not be questioned by stranger.*—The attorneys for the defendants having executed such contract for and on behalf of their clients, if there was a want of authority in the attorneys to execute the contract, the clients alone can avoid it; and if they acquiesce, the sureties of the sheriff, when sued for the fund, can not complain.

3. *Contract by infant; when he can not repudiate.*—If a party, after attaining his majority, accepts the benefits of a contract executed by him during his infancy, he can not afterwards repudiate its burdens.

4. *Attorney and client; notice to attorney notice to client.*—Notice to an attorney, while in the employment and service of his client, of facts connected with the business in which he is engaged, operates as notice to the client.

5. *Extent of remedy by court of equity, when jurisdiction once acquired.* When a court of equity has acquired jurisdiction of the primary purposes and objects of a suit, it will settle the litigation, although it may involve the adjudication of mere legal questions, without remitting the parties to a court of law for the adjustment of legal rights which are consequential or incidental.

APPEAL from Mobile Chancery Court.

Heard before Hon. JOHN A. FOSTER.

This was a bill in equity by Thomas H. Price, as surviving partner of Gibbons & Price, a late partnership engaged in the practice of the law, and D. C. Anderson and James Bond, partners practicing law under the firm name of Anderson & Bond, against James A. Carney, Elijah S. Taylor, John B. Bryars and Wiley Bryars; and was filed on 28th December,

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1881. As appears from the record, on and prior to 25th April, 1879, there were pending and undetermined in the circuit court of Baldwin county two attachment suits against James Hadley and others, seeking the recovery of damages resulting from assaults and batteries, one by John B. Bryars, and the other by Wiley Bryars; and in these suits, which had been pending for several years, and were much litigated, Gibbons & Price represented, as attorneys, the plaintiffs, and Anderson & Bond represented, in like capacity, the defendants. Prior to that time, criminal prosecutions, commenced by indictment, had been begun and concluded in said court against the defendants in the attachment suit, James Hadley and others; and in these prosecutions Gibbons & Price, under employment by John B. and Wiley Bryars, who were prosecutors, had aided the State's solicitor, and the defense was conducted by Anderson & Bond. There also existed at said time claims in favor of the defendants in the attachment suits, James Hadley and others, against the Bryars and their sureties on the attachment bonds, for damages for the alleged wrongful and vexatious suing out of the attachments; and in reference to these claims the parties were represented respectively by the same attorneys. Under the attachments a considerable amount of property belonging to the defendants therein had been seized and sold by one Chandler, as sheriff of Baldwin county, realizing \$2837.72, and a smaller amount by the sheriff of Escambia county, under branch writs, realizing about \$300 net; which sums, on 25th April, 1879, were held by said officers respectively, subject to the final disposition of the attachments. The several parties to said suits and controversies were unable to pay their attorneys for their services therein, otherwise than out of the fruits or avails of the suits, they being insolvent.

On 25th April, 1879, after several years of litigation, the parties to said suits came to an agreement and settlement of the several matters of litigation and controversy above mentioned, which was reduced to writing and signed by John B. and Wiley Bryars, Anderson & Bond "on behalf of James Hadley and others, parties to said suits," Gibbons & Price, "attorneys for J. B. and Wiley Bryars," and by T. H. Price and Anderson & Bond, individually. This agreement, after reciting the above matters of suit and dispute, and in settlement thereof, provides: "That in the two suits now standing on the docket in favor of said John B. and Wiley Bryars, judgments shall be rendered for one-half of the proceeds of property sold by the sheriff of Baldwin, and the sheriff of Escambia counties; but said judgments shall not be used against the said defendants, Hadley and others, for any other purpose than as a basis to collect the amount in the hands of said



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sheriffs from the said sheriffs, or their sureties; and this agreement is, in all other respects, a mutual release between the parties to said suits, each to the other, of all claims and demands, of whatsoever sort or kind." Then, after reciting the services rendered by said attorneys for their respective clients in said suits, and an agreement on their part "to prosecute suits for the recovery of said funds from said sheriffs, or their sureties," said agreement proceeds: "Therefore, for compensation to said attorneys for their said services, rendered and to be rendered, it is agreed that Gibbons & Price shall retain two-thirds of the sum of money, when collected, that is due by the sheriff of Escambia county, and give to Anderson & Bond one-third thereof; and the amount recovered from the sheriff of Baldwin county, or his sureties, shall be divided as follows: John B. Bryars, five hundred dollars, and to W. J. Bryars five hundred dollars; and of the remainder, two-thirds to Gibbons & Price, and one-third to Anderson & Bond; and said judgments in favor of said John Bryars and W. J. Bryars are then to be satisfied on the record. It is further stipulated and agreed that Thomas H. Price, of Gibbons & Price, shall have the control of said judgments, and of the funds to be realized from said sheriffs, or their sureties, until this agreement be fully completed and ended."

If the proof does not show an authority on the part of Anderson & Bond to execute this agreement on behalf of their clients, the defendants in said attachments, Hadley and others, it does show that the latter desired a compromise and settlement of the several matters of controversy, for the purpose, mainly at least, of obtaining compensation for their attorneys; and that they were advised of the agreement and its provisions, and had acquiesced therein. It is also shown that the compensation provided for the attorneys by the agreement was inadequate.

In pursuance of the agreement, judgments were rendered in the attachment suits in favor of the plaintiffs, and orders obtained, condemning the funds realized from the sales of the property levied on, to the satisfaction of said judgments "equally and *pro rata*." Chandler, the sheriff of Baldwin county, having died insolvent, without accounting for the funds which had come to his hands, the complainants demanded payment from the defendants. James A. Carney and Elijah S. Taylor, who were Chandler's sureties on his official bond as sheriff; and failing to obtain payment, they instituted suits in said circuit court against said defendants on said bond, in favor and in the names of John B. and Wiley Bryars, severally, to recover said funds. While these suits were pending, Carney and Taylor, without notice to the complainants, obtained from

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John B. and Wiley Bryars, for the sum of \$300 paid to each of them, written releases, discharging and releasing Carney and Taylor from all further liability as sureties on said bond, and growing out of the matters involved in said suits; and thereafter they pleaded said releases in the said circuit court in bar of the said suits brought against them by complainants. The bill charges, and the evidence introduced on behalf of complainants tended to show, that Carney and Taylor, at the time of the execution of said release, had notice through their attorney of said agreement, hereinabove set out, and of the complainants' rights and interest thereunder; but this is denied in the answers, and some evidence was introduced by said defendants in support of such denial.

The prayer of the bill is, that Carney and Taylor be required to deliver up said releases, and that the same be declared null and void, and be cancelled; or that "they may be limited by decree of this court to the interest in said funds which said John B. Bryars and Wiley Bryars have therein, namely, five hundred dollars each;" that the said defendants be perpetually enjoined from pleading said releases in bar of the said suits at law; "or that your Honor will take jurisdiction of the whole claim of your orators under said agreement, and order the said Carney and Taylor, after the amount due them shall have been ascertained in this court, to pay the same into this court, or that decrees may be made in favor of your orators for their respective shares under said agreement against the said defendants, Carney and Taylor, and that your orators may have executions thereon respectively for the collection of the same;" and for general relief.

The defendants answered the bill, and incorporated in their answers demurrers and pleas. The principal points made by these several pleadings in defense of the bill are, (1) that said agreement is champertous and void; (2) that Carney and Taylor, at the time of the execution of said releases, had no notice of the execution or existence of said agreement; and (3) that Anderson & Bond had no authority to execute said agreement for their clients, the defendants in the attachment suits, Hadley and others, and it was, therefore, not binding on them, or on the Bryars. The infancy of Wiley Bryars, at the time of the execution of said agreement, is set up by him; and (4) by the demurrers it is also insisted that complainants had a plain and adequate remedy at law.

On the hearing, had on pleadings and proof, and on the demurrers to the bill, the chancellor, being of opinion that the complainants were not entitled to relief, caused a decree to be entered, dismissing the bill; and that decree is here assigned as error. Thomas H. Price having departed this life, his execu-

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trix, Mrs. Martha A. Price, joined in the prosecution of this appeal.

ANDERSON & BOND and P. & T. HAMILTON, for appellants. (1) Champerty is defined to be a bargain with plaintiff or defendant to divide the land or other matter sued for between the contracting parties, if they prevail at law, the champertor undertaking to carry on the suit at his own expense.—1 Bou. Law. Dic. 218; *Holloway v. Lowe*, 7 Port. 488; *Poe v. Davis*, 29 Ala. 676. It is one of the essentials of champerty, that the party shall interfere in suits in the results of which he has no interest.—*Thompson v. Marshall*, 36 Ala. 512; 11 Mees. & Wels. 682; 2 Story's Eq. Jur. § 1048a; 64 Ala. 66. When the agreement was made, the fund had not been condemned, the suits had not been finally tried, and both parties were interested in the fund.—*Scarborough v. Malone*, 67 Ala. 570; Drake on Att. (5th Ed.) § 426; *Blake v. Shaw*, 7 Mass. 505. Anderson & Bond became interested in the fund; and it was not unlawful for them to agree to assist in its recovery. *Thompson v. Marshall*, 36 Ala. 512; *Vaughan v. Marable*, 64 Ala. 66; *McCall v. Capehart*, 20 Ala. 526. The chief object and purpose of the agreement was to settle the prior litigation between the Bryars and Hadleys. Securing the attorneys in their compensation was incidental and subsequent to the main purpose. If the suits had ended under a separate agreement, and then a subsequent agreement had been made, securing the attorneys their fees out of the fund, such an agreement would have been lawful.—*Walker v. Cuthbert*, 10 Ala. 213. Can it make any difference that the agreement to pay counsel is in the same agreement, but in a subsequent part of it?—*Lytle v. State*, 17 Ark. 608. The very object and intent of the law of champerty is to prevent interference and maintenance of *pending* lawsuits and controversies. It is something which is *uncertain* and *unsettled*, and so giving rise to *speculation* in lawsuits and controversies. The attorneys in such a case as this are "to be regarded as assignees of the judgment or decree."—*Warfield v. Campbell*, 38 Ala. 527; *Ex parte Lehman, Durr & Co.*, 59 Ala. 631; *McPherson v. Cox*, 6 Otto, 404; *Brown v. Bigley*, 3 Cooper Ch. 618; *Hunt v. McClanahan*, 1 Heisk. 503; *Pleasants v. Kortrecht*, 5 Heisk. 694; *In re Paschal*, 10 Wall. 483; 18 N. Y. 368. The fund, in the eye of the law, was in court; and the court proceeded to condemn it to the satisfaction of the judgments. There was no element of uncertainty; on the contrary, there was the highest evidence of a certain and fixed liability.—*Dunklin v. Wilson*, 64 Ala. 164; *Palmer v. Clarke*, 2 Dev. (Law) 354. The mere fact that a suit was or might be necessary to coerce payment from the sureties of the sheriff, is



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not sufficient to taint the agreement with champerty or maintenance.—*Broughton v. Mitchell*, 64 Ala. 221; *Pleasants v. Kortrecht*, 5 Heisk. 694. (2) The ground of demurrer, that complainants had an adequate remedy at law, is not well taken. See 13 Ohio, 167 (42 Am. Dec. 194); 7 Mees. & Welsb. 86-7; B. & Ad. 96; 7 T. R. 659; 5 Bing. (N. C.) 688 (35 E. C. L. R. 271); 6 Mees. & W. 490; 9 Port. 63; 2 Ala. 571; 1 Ala. 102; 8 Cow. 293; 1 Story's Eq. Jur. § 190; 2 *Ib.* §§ 903-4, 962, 1039, 1040, 1047, 1056-57*a*, 1250. (3) And when a court of equity takes jurisdiction, it will go on and settle the whole matter, without sending the parties back to a court of law.—1 Brick. Dig. p. 639, § 5; 2 Story's Eq. Jur. §§ 1057-57*b*, 1250; 29 Ala. 397; 31 Ala. 274. (4) The attorney of Carney and Taylor, who defended the suit against them, and who prepared the release and aided in consummating it, had notice of the existence of the agreement with complainants, and of its material provisions. The evidence discussed at length on this point. The attorney having notice, it operated as notice to his clients, Carney and Taylor.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Fitzherbert v. Mather*, 1 T. R. 16; Paley on Agency, 199; *Willis v. Martin*, 4 T. R. 66; Whart. Agency, §§ 302, 177-8; Story's Agency, § 140; *Pepper v. George*, 51 Ala. 194; *Scarborough v. Malone*, 67 Ala. 570; *M. & O. R. Co. v. Thomas*, 42 Ala. 673.

JOHN GAMBLE, with whom was DAVID CLOPTON, *contra*. (1) The contract set up in the bill, when analyzed and stripped of all surplus averments and recitals, is a contract between the complainants, as attorneys, and the defendants Bryars, as clients, by which the complainants, as attorneys, for services rendered and to be rendered, were to receive a part of the thing in dispute, or some profit out of it; and it is clearly champertous and void.—*Holloway v. Lowe*, 7 Port. 488; *Byrd v. Odem*, 9 Ala. 755; *Dumas v. Smith*, 17 Ala. 305; *Wheeler v. Pounds*, 24 Ala. 472; *Poe v. Davis*, 29 Ala. 676; *Jenkins v. Bradford*, 59 Ala. 400; 1 Brick. Dig. p. 334, § 1; 7 Wait's Ac. & Def. pp. 73-5; *Ware v. Russell*, 70 Ala. 174. (2) A client certainly has authority to compromise a demand in litigation and represented by counsel, without consulting the latter. The defendants Carney and Taylor had no notice of the agreement with complainants, when the release was executed; and hence, the validity of the release can not be affected by such agreement. (3) The complainants have a full and adequate remedy at law, and the demurrers should have been sustained. This point discussed. (4) It is true, ordinarily, that a court of chancery, having once taken jurisdiction of the person and subject-matter, will settle the entire litigation,

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though it may involve the enforcement of legal demands; but this is true only when the court has jurisdiction of the primary purposes of the bill, and the right to relief in respect to them is shown, and the legal demand is consequent thereon.—*Pond v. Lockwood*, 8 Ala. 669; *Dickinson v. Bradford*, 59 Ala. 581. (5) The execution of the agreement by Anderson & Bond on the part of the Hadleys can not be upheld. They had no authority as attorneys in fact, and such authority did not result from the relation of attorney and client. They only had authority to diligently prosecute their clients' cause.—*Kirk v. Glover*, 5 Stew. & Port. 340; 1 Brick. Dig. p. 191, § 30; *Chapman v. Cowles*, 41 Ala. 103.

BRICKELL, C. J.—There are numerous objections to the admissibility of evidence, not considered by the chancellor, and a consideration of which was unnecessary in the view he felt constrained to take of the case. We do not find it necessary now to make them matter of special consideration, for the material facts, upon which the rights of the parties depend, are few, and are shown either by evidence which is uncontroverted, or by evidence free from all just objection.

The primary question is, whether the contract of April 25, 1879, is tainted with champerty. When fairly analyzed, the objects and purposes of the contract are not matter of doubt, or uncertainty. The first was the adjustment and quieting of litigation between the parties, the subject of several suits, in which the parties stood in the several relations of plaintiffs and defendants. The second was the payment to their respective attorneys of compensation earned in the prosecution or defense of the suits, and in the prosecution or defense of the indictments against the Hadleys and others, all growing out of the same unfortunate occurrence. The third was obtaining from the sheriffs of Baldwin and Escambia counties the moneys remaining in their hands, derived from the sales of personal property levied upon by the attachments. The fourth was the application of these moneys, when received, in the order, and for the purposes expressed in the contract. The legal effect and operation of the contract was a transfer to Price of the beneficial interest in the judgments in favor of John B. and Wiley Bryars, respectively, charged with the trust and duty of collecting the moneys in the hands of the sheriffs, and applying them, when collected, to the uses and purposes expressed in the contract, whereby the litigation would be finally quieted, and the attorneys of the parties compensated for the services they had rendered. The contract was executed by the rendition of judgment, and the dismissal of suits, in accordance with its terms. It is very certain that it was entered into and executed

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by all the parties intelligently, in good faith, and in the absence of all fraud, misrepresentation, or undue influence. And, so far as is shown by the evidence, the compensation secured to the attorneys for the services which they had rendered, is barely just and adequate. Champerty, as it may be defined in view of our past decisions, "is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profit out of it; and covers all transactions and contracts, whether by counsel or others, to have the whole or part of the thing or damages recovered."—*Ware v. Russell*, 70 Ala. 174. It is impossible to draw this contract within the influence of this definition, and it is equally impossible to impute to it the corrupting tendencies which vitiate champertous agreements. The quieting of litigation was the primary, controlling purpose of the parties—when the contract was executed, all opportunity and necessity for litigation were removed. Intending the execution of the contract, the parties dealt as if the thing was done, which they intended should be done. There was no more than the transfer and appropriation of judgments, which they regarded as rendered, to pay the compensation of their attorneys for services already rendered. The amount of the compensation was not dependent upon the commencement, or upon the continuance of litigation, and the profits it should yield. The transfer or assignment to counsel of specific parts of judgments which have been rendered, or to be rendered, is essentially different from a contract by which they are to have a part of the thing in dispute, for maintaining a suit for its recovery.—*Walker v. Cuthbert*, 10 Ala. 213.

In the language of Lord Abinger, in *Prosser v. Edwards*, 1 Y. & C. 484, quoted and adopted by this court in *Poe v. Davis*, 29 Ala. 676: "All our cases of maintenance and champerty are founded on the principle, that no encouragement shall be given to litigation, by the introduction of parties to enforce those rights, which others are not disposed to enforce." This sound and conservative doctrine is not contravened by the contract under consideration. As we have said, its controlling purpose was the silence of long protracted, and not the commencement or continuance of, litigation. When executed, further litigation was impossible, unless the sheriffs, holding the moneys they were bound to pay over on the rendition of the judgments, proved refractory or delinquent in the performance of official duty. There is no principle of law inhibiting parties, having a just claim to moneys in the hands of ministerial officers, from assigning or transferring such a claim. Property or rights involved in litigation, or resting wholly in action, are the subject-matter of assignment, and by fair contract may be acquired by attorneys, or by others, if it be not of the



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essence of the contract that suits shall be maintained, and the consideration, a division of the profits.— *Ware v. Russell*, *supra*; 2 Story Eq. § 1050. We can not concur in the opinion of the chancellor, that there is a taint of champerty in this contract.

We may pass all that is urged as to the obligation of the contract upon the Hadleys. If there was a want of authority in their attorneys to make the contract, it may be, they could have avoided it. Avoidance rested in their discretion; a discretion they alone could exercise; if they acquiesce, strangers can not complain. We pass, also, all that is said in reference to the infancy of Wiley Bryars; since his maturity, he has accepted the benefits, and he can not repudiate the burdens of the contract, if any it imposes.

The remaining question is, whether, when the releases were executed, Carney and Taylor had notice of the contract, and of the rights it conferred upon Price and upon Anderson & Bond. The releases were obtained and executed by and through the agency and instrumentality of the attorney of Carney and Taylor, employed to defend the suits pending against them; he was present at their execution, and when the money was paid which forms their consideration. The rule of law is unquestioned, that notice to an attorney, while in the employment and service of his client, of facts connected with the business in which he is engaged, operates as notice to the client.— *Wiley v. Knight*, 27 Ala. 336; *Smyth v. Oliver*, 31 Ala. 39. A disputed fact is, whether notice to the attorney is shown, and a careful examination of the evidence satisfies us that the inquiry must be answered affirmatively, and is properly so answered, without impugning the credibility of any witness testifying in reference to it.

The release, though inoperative to affect the rights and equities of Price, and of Anderson & Bond, is valid and operative to extinguish the claims of the parties by whom it was executed. A court of equity, having jurisdiction to limit its operation, so as to preserve the rights of all parties, should settle finally the litigation, without remitting them to further controversy in the court of law. The doctrine of the court is, that if it has jurisdiction of the primary purposes and objects of a suit, it will, though it may involve the adjudication of mere legal questions, settle the litigation, without remitting the parties to a court of law, for the adjustment of legal rights, which are consequential or incidental.—1 Brick. Dig. 639, § 5.

The decree of the chancellor must be reversed, and a decree will be here rendered in conformity to this opinion.

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### *Bill in Equity by Ward to vacate and set aside Settlement made with Guardian, and for an Account.*

1. *Contract by infant; ratification of.*—If an infant, on arriving at age, with a knowledge of all the facts, ratifies a contract for the purchase of lands made by him during infancy, in the absence of any relation of trust or confidence between him and the vendor, and of fraud practiced upon him, he will not afterwards be heard to complain; and if, after attaining his majority, with knowledge of all the facts, he deals with the property in a manner inconsistent with his right to rescind, or waits an unreasonable time before he asserts that right, this operates a constructive ratification, which will uphold the contract.

2. *Same; ratification of, as between guardian and ward.*—But when the contract is between an infant and his guardian, the courts exercise a narrower scrutiny of the transaction, and exact fuller and clearer proof of fairness, before yielding their sanction thereto; and even after the relation of guardian and ward has terminated, all dealings in property between them are regarded with distrust and *prima facie* disapprobation, until, by lapse of time, the presumption of undue influence has been overcome.

3. *Settlement by guardian with ward; when suit to set aside not barred by undue delay.*—On a settlement by a guardian with his ward, which was agreed on, reduced to writing and signed when the latter was eighteen years of age, the ward agreed to accept, in full discharge of the guardian's liability to him, certain real and personal property, the value of which did not exceed half of the amount of the guardian's liability; and about a year thereafter, the ward having been relieved of the disabilities of nonage, the guardian and his wife, in consummation of the settlement, executed to the ward a conveyance, and the ward, acting without advice of counsel, and not being advised by the guardian to seek such advice, received possession of the property, and executed to the guardian a release. The real estate, which constituted the bulk of the property forming the consideration of the release, belonged to the wife, as her statutory separate estate; and of this fact the ward had knowledge at the time the conveyance was executed, but he did not know that, as to the real estate, the conveyance, being of the statutory separate estate of the wife in payment of her husband's debt, was void. *Held*, on a bill by the ward to vacate and set aside the settlement and release, and for an account, filed more than five years after the execution of the conveyance (during which time he continued in possession of the property, using and enjoying the same as his own), but without delay after having been advised by counsel of the legal effect of the conveyance, that the conclusive presumption, that all men know the law, does not apply; that the ward's ignorance of the effect of the conveyance was a complete answer to the objection of undue delay in the assertion of his rights; and that he was entitle to relief.

4. *Amendment of bill in equity; demurrer to original bill not visited on.*—The bill, as originally filed, failing to offer to surrender the deed executed by the guardian and his wife for cancellation, etc., a demurrer was interposed on this ground, when the bill was amended by adding to one

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of the sections the words, "And complainant hereby offers to do in the premises whatever the court shall direct;" but to the bill as amended no demurrer was filed. *Held*, that while on demurrer the bill as amended was scarcely sufficient, yet, the defect being amendable, the demurrer to the original bill could not, on appeal, be visited on the amendment, but that, to enable the complainant to take advantage of the defect, he must show by the record that he invoked the judgment of the primary court, by demurrer, upon the sufficiency of the amendment.

5. *Decree relieving married woman of disabilities of coverture; when void.*—A decree relieving a married woman of the disabilities of coverture, based on a petition which fails to aver that she owned any separate estate, is *coram non judice* and void; and hence, a deed executed by the guardian's wife after having obtained such a decree, conveying to the ward the lands covered by the first deed, is also void.

6. *Conveyance of land, the wife's statutory estate, in payment of husband's debt; when not affected by subsequent conveyance by him to her of other lands.*—The fact that, a short time before the commencement of the suit, the husband conveyed to his wife another and more valuable tract of land, in performance of a verbal contract made by him with her at the time of the execution of the conveyance and release, does not render the ward's title good, nor bind him to accept a title requiring litigation, delay and expense to render it indefeasible, even if a court of equity would approve and confirm the conveyance; nor does the conveyance derive any support from the antecedent verbal contract to convey.

7. *Decree setting aside settlement between guardian and ward; effect of failure to order restitution of property and cancellation of deed received by ward.*—On appeal from a decree rendered in such case, setting aside, vacating and annulling the settlement made by the guardian with his ward, and ordering another and final settlement, the failure to require a surrender of the property received by the ward, and a cancellation of the deed executed to him, can not be the subject of assigned error, though such surrender and cancellation are necessary to a complete determination of the cause; they being mere details in the execution of the decree, not pertaining to the equity of the bill, as to which the decree is interlocutory, though final in the sense that it will support an appeal.

8. *Same; when direction as to taking account will not be considered on appeal from.*—Nor on appeal from such decree is it subject of assigned error, that the chancellor instructed the register, in stating the account against the guardian, to charge him with the balance ascertained against him on his last partial settlement in the probate court, allowing him credits for proper and legal expenditures made by him for his ward between the time of such annual settlement and the settlement sought to be set aside. If either party desires to go behind the partial settlement, this is a question of fuller instructions to the register, to which he is entitled on petition or motion therefor.

9. *Same; effect, on appeal, of failure to charge ward with rents.*—While the ward is chargeable with the rents of the land while in his possession, with interest from the end of each year, subject to abatement for taxes paid, and for permanent improvements, if any remain which were placed thereon by him, yet, pertaining as they do to the execution of the decree, as to which it is also interlocutory, the failure to instruct the register to charge the ward with such rents, in stating the account against the guardian, is not, on appeal from the decree, ground for reversal.

10. *Same; ward chargeable with rents as payments.*—The husband being estopped, in such case, by his conduct and conveyance, from recovering the rents by any active measure of relief, and the wife not being able, by reason of such estoppel, to recover in his right, the rents will be treated as if they had been realized and then paid by the guardian in part liquidation of his indebtedness to his ward.



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APPEAL from City Court of Selma.

Heard before Hon. JON. HARALSON.

The facts are stated in the opinion.

PETTUS &amp; DAWSON and SATTERFIELD &amp; YOUNG, for appellants.

1. The admitted fact that the ward did not get as much in value as his guardian owed him, would have authorized the setting aside of the settlement, if suit had been brought *within a reasonable time*. But on the principles of ratification, election and estoppel, the complainant is now cut off from all relief. The contract of May 4th, 1875, was voidable, and not void.—*Weaver v. Jones*, 24 Ala. 420; *Philpot v. Bingham*, 55 Ala. 435; Tyler on Infancy, 76-8, and cases cited. "Voidable means, not invalid until ratified, but valid until rescinded." Wharton on Con. § 56. The law on the subject of ratification is well settled. The principle is stated in Wharton on Con. § 58. In *Manning v. Johnson*, 26 Ala. 446, the rule applicable to cases like this is laid down as follows: "If an infant, after he arrives at age, is shown to be possessed of the consideration paid, whether it be property, money or choses in action, and either disposes of it so that he can not restore it, *or retains it for an unreasonable length of time after attaining his majority, this amounts to an affirmation of the contract.*" This point discussed at length, with following citations: *Jackson v. Harris*, 66 Ala. 565; *Gurley v. Davis*, 7 Ala. 317; *Thomason v. Boyd*, 13 Ala. 419; *Delano v. Blake*, 11 Wend. 85 (25 Am. Dec. 617); *Cheshire v. Barrett*, 4 McCord, 241 (17 Am. Dec. 735); *Aldrich v. Grimes*, 10 N. H. 194; *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. Boright*, 9 Vt. 368; *Chessterfield v. Janssen*, 2 Ves. sr., 125; *Pintard v. Martin*, 1 Smedes & Mar. Ch. 126; *Henry v. Root*, 33 N. Y. 526; *Robinson v. Cullum*, 41 Ala. 693; *Daniel v. Modawell*, 22 Ala. 365; *Franklin v. Thornebury*, 1 Vernon (Ch.), 132; *Kern v. Burnham*, 28 Ala. 428. There is one distinction in cases of delay which must be constantly kept in mind. It is this: Where a person receives nothing, and is in possession of nothing, he does not ratify, or affirm, or elect to be bound, simply by waiting. He has nothing with which he can deal so as to effect an estoppel. Not so where the person has received property. If he retains it and uses it as his own, he ratifies the contract.—*Ferguson v. Lowery*, 54 Ala. 514, distinguished.

2. At the time of the settlement, *no fact* was concealed from the plaintiff; he then knew *every fact* connected with the transaction, and he was well acquainted then with the property which he received. This absence of concealment, this knowledge of the *facts*, plainly distinguishes this case from nearly every case cited by counsel for the appellee. In

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nearly every one of those cases, there appears either a concealment of a *fact*, or a want of knowledge of a *fact*, which induced the court to grant the relief. The real question here presented is, whether the plaintiff's *ignorance of the law*, established, if at all, *only* by his affirmation, will avoid the effect of an *election*, proved not by mere assent to what had been done, but by facts established by the plaintiff himself and by all the witnesses—an *election* which the law infers from the facts as absolutely as it infers an intention to kill from a deliberate killing with a deadly weapon. After quoting from the opinion in *Hardigree v. Mitchum*, 51 Ala. 153-4, discussing the maxim, *Ignorantia legis non excusat*, and noticing the qualification there announced to the effect that where ignorance of the law "is *induced*" by fraud or undue influence, the application of the maxim is relaxed, counsel proceed: The "relaxation of the rule," there stated is in exact harmony with the rule of law which gives a reasonable time to ascertain a *fact* which has been misrepresented to the party when that fact is open to the inquiry of both parties. If the fact misrepresented is within the knowledge of the party misrepresenting it, then the law allows the party to move when he has discovered this hidden fact. The law, what is law, can never be regarded as a hidden thing; and a knowledge of the law is open to the inquiry of all persons alike. And we submit that to allow a man to justify his gross *laches* merely on his *ignorance of the law*, though that ignorance were induced by another, would be exactly the same thing as to allow unreasonable delay after he had been put upon inquiry as to the truth of a matter of *fact* misrepresented to him. Every man *sui juris* is in all cases put on inquiry as to the law. There are in the books many "*dicta*" expressed on the bench in reference to "knowledge of the law," or that the contract is "impeachable," which are without any foundation in the facts or law of the case under consideration. In *Morse v. Wheeler*, 4 Allen, 570, some of these cases are discussed. That was a case where an infant purchased cattle, paid part in cash, and after becoming of age promised to pay the balance. It was insisted as a defense that when the promise was made the defendant did not know that his original contract was "impeachable," but the Supreme Court of Massachusetts repudiated the defense, on the ground that the defendant *was presumed to know the law*; and in the opinion that court reviews many of the *dicta* in the English and American cases, including what is called the "unreasoned case" of *Hinely v. Margaritz*, 3 Barr, 428. See, also, Wharton on Contracts, § 57. The case of *Kern v. Burnham*, 28 Ala. 428, is relied on as a case on "all-fours" with the one at bar. That case establishes beyond the

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possibility of a doubt, that the case at bar is a case of *election*. The contract was *executed*. The plaintiff, if he would avoid the contract, must become *the actor*, and must move within a reasonable time. He knew all the *facts* at the time the contract was made. He was then in law *sui juris* ; and, with the duty on him to *elect*, he remained in possession, treated all the property which he had received as his own for about five years and five months, without complaint of any kind, or any offer to rescind, before bringing his suit. Surely this is an *election* on the part of the plaintiff "to treat the contract as a valid and subsisting one."

3. If the confidential relation of the guardian creates a distinction between this and ordinary contracts of infants, it only amounts to this, that the infant, in cases like the present, is allowed a *reasonable time*, within which to make his *election*. It is still a clear case for *election*. In ordinary cases the time for election is very short after majority. Holding beyond the rent day, disposing of personal property received as his own, establishes an election in cases of executed contracts ; and even in cases of executory contracts made by infants, ordinarily a mere promise, after majority, to pay is binding on them. In ordinary cases *no time* is allowed infants when they, after majority, treat the property purchased as their own. For such an act, after majority, is conclusive evidence of an *election* to treat the contract as valid, and estops the infant to say that he is not bound by it. An election made, in such case, can not be avoided ; nor can an election once made, with full knowledge of the facts, be avoided in any case ; for an election is an estoppel. Otherwise, this right of election, after majority, to avoid a contract would be converted from a shield into a sword.

4. The complainant having had, when the contract was made, a full knowledge of the facts, the question is narrowed down to what is a reasonable time in such case for him to make his election. The right and the duty of electing were on him the day on which he became in law *sui juris*. After this period he waited over five years and four months ; and during all that time, he constantly used and disposed of, as his own, property which he had received under the contract. This was too long to wait.—*Kern v. Burnham, supra*. This case is not one of simple ratification by agreement on becoming of age, or soon afterwards, but is much stronger ; for it is a case, as we have shown, of *election*, and a case in which the plaintiff was bound to elect within a reasonable time. In many cases of ratification, the doctrine of election is not involved, and the court is asked to consider the legal effect of this rule of election. This doctrine of election or estoppel, resulting from acts which the law declares to be an election, must, in this case, be considered



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in connection with the broad distinction between executory and executed contracts; and when so considered, it seems to us that it is impossible to avoid the conclusion, that the plaintiff, by holding and enjoying the fruits of the settlement for more than five years after attaining his legal majority, with full knowledge of the facts, is conclusively presumed to have *elected* to treat that settlement as valid.

5. In *Jackson v. Harris*, 66 Ala. 565, a case like this, it is said: "But the law, in this class of cases, as in all others, requires diligence of parties who invoke its remedial aid." In this case the plaintiff needed no diligence to discover the *facts*, for as to them he was fully informed at the time of the settlement. Must he use no diligence to discover the *law* which is open alike to the inquiry of all mankind? Where facts are hidden within the bosom of the man who perpetrates a fraud, a different rule is prescribed by law from cases where the facts are known to many, or are of record; for, in the latter cases, diligence will discover them, but in the former, it is only by accident, or something of that nature, that the fact is made known. If ignorance of the law would excuse delay, will it also excuse an absolute want of diligence? The rule is, that a party must be diligent in all cases when he seeks the remedial aid of the court; yet, this rule will have to be abolished in this case if relief is granted complainant. Could a man, diligent to ascertain what the law was in this case, have failed to discover it in five years and four months? The question must receive a negative answer.

6. The real consideration to Mrs. Voltz for her land was the "River place," and the consideration paid by the plaintiff was the release. As between husband and wife, there was an exchange of places. It is true that this agreement was verbal at the time of the settlement, but the husband's conveyance to her, afterwards executed, was in accordance with the verbal agreement. Mrs. Voltz is a party to this suit, and she is willing, and offers in her answer to ratify and confirm this exchange of places; and this she attempted to do in another form, but, owing to a technical defect, she failed to accomplish her purpose. So it is insisted that, whatever may be said with reference to the legal title, the plaintiff has a perfect title in equity to the "Chesnut place," the lands sought to be conveyed to complainant. The general rule is admitted, that a mortgage or other conveyance of the statutory separate estate of the wife, *merely* to secure or pay her husband's debts, is invalid. But that is not this case. The wife, at common law, and under our statutes, is capable of purchasing and receiving title to land, if the husband assents thereto, either expressly or by making no objection.—*Marks v. Cowles*, 53 Ala. 504; *Lee v.*

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*Sims*, 65 Ala. 248; Kelly's Con. of Married Women, pp. 131-4, and authorities there cited. The legal effect of the transactions between the parties in this case was the purchase of the "River place" by the wife, she giving in exchange therefor the "Chesnut place." This case is, therefore, not distinguishable from *Kern v. Burnham*, 28 Ala. 428.

7. The amendment to the original bill did not cure the defect pointed out by the demurrer. The general offer to do equity, contained in the amendment, is insufficient.—*Eureka Co. v. Edwards*, 71 Ala. 248; *Manning v. Johnson*, 26 Ala. 446; Tyler on Infancy, pp. 77-9, and cases cited. The amendment states no fact, but merely an *offer*, and required no answer. It did not make an *amended bill*.—*Cain v. Gimon*, 36 Ala. 173. And it took "effect as of the time of the filing of the bill." *Crews v. Threadgill*, 35 Ala. 342. Not curing the defects in the original bill pointed out by the demurrer, its effect is not avoided, nor was it waived by failure to demur to the bill after amendment. This point argued at length. Again: The demurrer was treated and considered in the court below, by the court and the parties, as applying to the bill as it was at the hearing. It was there argued and considered, and, in the final decree, was overruled. Its existence and application are questioned for the first time in this court. It should, therefore, be considered in this court as applying to the bill as it was at the time of the hearing.—*Shaw & Co. v. Lindsey*, 60 Ala. 349. While the defects pointed out by the demurrer do not go to the substantial equities *claimed for the complainant*, and are amendable, they do go to the substantial equities *of the case made by the bill*; for in every case like this the *defendants have equities* which the court *must protect*. These *equities of the defendants* were clearly pointed out by the demurrer, and are, (1) the rents of the Chesnut place for nine years; (2) possession of that place; and (3) a cancellation of the deed executed to the complainants. These equities can not be decreed the defendants in the absence of an offer in the bill; for it is only by such offer that the court acquires *jurisdiction* to grant the necessary relief against complainant to the defendants. *Tucker v. Holley*, 20 Ala. 426; *Rodgers v. Torbut*, 58 Ala. 525; *Eslava v. Crampton*, 61 Ala. 514; 1 Story's Eq. Jur. (12 Ed.) p. 58, § 64e.

8. The decree of the lower court is erroneous in failing to decree these *substantial equities* to the defendants. That court considered the question of rents in its opinion, and *expressly refused* to allow them, saying that "they are matters that do not appertain, legitimately, to this litigation."

9. A partial settlement of a guardian is not conclusive on either party; it is merely *prima facie* evidence of the correct-

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ness of the balance thereby ascertained ; yet, the chancellor, in his decree, has made the last partial settlement made by the guardian final and conclusive against him and his sureties, by ordering the register to charge him with the balance then ascertained, with interest thereon. In effect, the decree prohibits the guardian from proving any credits anterior to that partial settlement. This was erroneous.

BROOKS & ROY, *contra*.—1. The rule as to settlements in cases like the present : (1) It is always material that the ward should have competent, independent, disinterested advice. (2) There must be no substantial inadequacy of price or consideration. (3) There must be no misrepresentation or concealment of any material fact, nor just suspicion of artifice. (4) There must be full disclosure of all the facts and circumstances within the trustee's knowledge, which will enable the *cestui que trust* to deal with him on equal terms. (5) There must be the most abounding good faith on the part of the guardian ; he must not only bring to his ward's knowledge all that he himself knows in the premises, but he must take no advantage of his own position, influence, or knowledge.—*Ferguson v. Lowery*, 54 Ala. 512 ; *Malone v. Kelley*, 54 Ala. 538-9, 540 ; *Johnson v. Johnson*, 5 Ala. 95 ; *Jackson v. Harris*, 66 Ala. 565. And, as if to sum up all the commandments into one, our court has further said of such a contract : " It must be kept free from the taint of selfish interests and overreaching bargains."—*Thompson v. Lee*, 31 Ala. 305. And it has been repeatedly held, that any alleged confirmation or ratification of such a contract or settlement, to have that effect, must be with the same " full knowledge of all the facts," and with the *intent* that such act should confirm it."—*Thompson v. Lee*, 31 Ala. 297 ; *Johnson v. Johnson*, 5 Ala. 90. The principle upon which this rule is based, is obvious. In such cases, the contract itself, however solemn and deliberate, is invalid unless entered into with such full knowledge and intent ; and acts of alleged confirmation or ratification, to be operative as such, must necessarily be with the same full knowledge, and the same intent. Otherwise, greater operation and effect would be attached to the casual and informal acts of the party, than to his formal and deliberate contract.

2. The bill in this cause was filed in due time. All that is required in any such case is, that the action be "seasonable." What is seasonable in any given case depends, first, upon the analogies of the statutes of limitations, and beyond that upon the particular facts of each case. Under the English rule such actions were frequently maintained after the lapse of thirty and forty, and even fifty years ; and when our courts have used the



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term "seasonable," as defining the time in which such actions should be brought, in this State, they have done so with reference to the English rule of allowing thirty and forty years, and with a view to reducing the time, by analogy to the statutes of limitations, to a *minimum* of six years, where there are no special facts or circumstances to authorize an extension beyond that time. But no rule, authority, or analogy would, in any such case, restrict the time within which the action should be brought, to less than six years; and that limitation would be more than sufficient here. This point discussed, with citation of following authorities: *Johnson v. Johnson*, 5 Ala. 90; *Ferguson v. Lowery*, 54 Ala. 510; *Malone v. Kelly*, *Ib.* 532; *Jackson v. Harris*, 66 Ala. 565; Code, § 3234; *Porter v. Smith*, 65 Ala. 169; 2 Brick. Dig. p. 218, §§ 11, 15, 21; *Bradford v. Spyker*, 32 Ala. 134; *Tarleton v. Goldthwaite*, 23 Ala. 346; *James v. James*, 55 Ala. 530.

3. But irrespective of the six years which, as we insist, must be allowed in any such case, and of the principle that, beyond that period, the additional time allowed would depend upon the particular facts of each case, and of the further rule that every party is, by statute (Code, § 3234), allowed one year after the discovery of a fraud, within which to bring his action, there are other principles of law applicable to this class of cases, which would be conclusive in the case at bar, namely: (1) That as such a contract is, by presumption and intendment of law, held to have been obtained by "undue influence," time is never counted against the injured party while that undue influence continues to exist.—*Thompson v. Lee*, 31 Ala. 306. (2) That, in such cases, time is not counted, nor delay attributed, except from the date of the discovery, by the injured party, of the fraud practiced upon him.

4. The case of *Kern v. Burnham*, 28 Ala. 428, when properly understood, does not militate against these views, and is not in point to the case at bar. That case distinguished. But if it be supposed that the case is an authority against the appellee on the question of time, then it is certainly qualified, and, to that extent, overruled by the later and well considered case of *James v. James*, 55 Ala. 530, which settles that, in all such cases, where there is no actual fraud, and the question is merely one of time, the measure of time allowed is six years.

5. The doctrine discussed by counsel for the appellants, touching affirmance or disaffirmance by infants, upon coming of age, of contracts made by them in infancy, where no fiduciary relation existed, is not pertinent to the case at bar. Here the infancy of the plaintiff, it is true, was a fact in aggravation of the fraud, but it was not the *basis* of the relief sought. If, like Mrs. Ferguson, in *Ferguson v. Lowery*, *supra*, he had

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been twenty-four years old at the time of the settlement, he would be entitled to relief. So with the doctrine of frauds in contracts or conveyances, as between adults, in the absence of trust and confidence reposed. The doctrine, where *mere* infancy, or *mere* fraud is involved, is quite different from the doctrine of fraud, whether between adults, or an infant and an adult, *where there is a fiduciary relation*, and is governed by different rules and principles. These distinctions are sufficiently pointed out in *Malone v. Kelly*, 54 Ala. 538, 540. See also *Johnson v. Johnson*, 5 Ala. 96.

6. It is true, in a sense, that all persons are charged with knowledge of the law; and it is true that the appellee's disabilities of non-age were removed in 1876; but, in such cases, in considering whether there has been unreasonable delay, the question becomes one of *fact*; and the court is bound to see, from the record, that, as a matter of fact, the appellee did not know, and was not informed, that his title was worthless, until a short time before filing his bill.

7. The ward had no independent counsel or advice. Young and inexperienced, he needed care and advice. He relied upon his guardian and the guardian's attorneys. They were bound to place around him all proper care and providence.—14 Vesey, jr., p. 300. To this duty they were utterly false.

8. The offer in the bill as amended to do equity is sufficient. In such a case as this, the offer should not be limited and specific, but broad and comprehensive.—*Br. Bank of Mobile v. Strother*, 15 Ala. 61; *Martin v. Martin*, 35 Ala. 566; *Garner v. Leverett*, 32 Ala. 413; *Bailey v. Jordan*, *Ib.* 50; *Rogers v. Torbut*, 58 Ala. 525; *Eslava v. Crampton*, 61 Ala. 514.

9. The demurrer to the original bill was, in substance, confessed, and the bill amended by inserting the offer to do equity. The demurrer was never afterwards refiled; and there was not, in fact or in law, any demurrer to the bill as amended. The action of the court in overruling the demurrer in the final decree was unauthorized and superfluous, and the complainant can not be thereby prejudiced.

10. We have no objection to an accounting for rents, if such rents are to be credited on the guardianship debt; but if an independent accounting is sought, if it be contended that the rents should be treated as a separate and distinct fund, to be paid over to Henry E. Voltz, or to be reserved and made good out of the proceeds of property subjected to sale by the decree, then there are many valid and meritorious objections to that course. Though the rents and profits of the statutory separate estate can not be *subjected* to the payment of the husband's debts, he may himself use or dispose of them for that purpose, or any

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purpose, subject only to the penalty of removal from his trusteeship for misfeasance or malfeasance. Here, the husband, by his warranty deed, in which the wife joined, applied and disposed of these rents. The trustee, with the consent of the *cestui que trust*, if that had been necessary, disposed of that part of the trust fund, as to which the statute conferred upon him plenary power of disposition. The necessary operation and effect of the deed was to pass and apply whatever the husband had the power to pass and apply.—*Chapman v. Abrahams*, 61 Ala. 108. The husband can not now revoke that application. He is estopped by his act and his deed. The wife can not do so. She has no right to, and no power or control over, the rents and profits. The application made was valid, and is irrevocable.—*Daffron v. Crump*, 69 Ala. 79; *Early v. Owens*, 68 Ala. 176; *Cook v. Meyer Bros.*, 73 Ala. 580. But if such right existed, and could be enforced in a direct proceeding, and after the husband's removal from his trusteeship, it can not be done, as between the parties, or under the pleadings and issues in this cause.

STONE, J.—The present bill was filed by the appellee, for the purpose of opening and remaking a settlement he made with Henry E. Voltz, his guardian. The terms of settlement were agreed on and reduced to writing and signed, when the ward was a little more than eighteen years old. A year afterwards the complainant, by chancery decree, was relieved of the disabilities of minority, and soon afterwards the agreement of the year before was consummated, and Henry E., the guardian, conveyed to James W., the ward, property, real and personal, in full discharge of the former's liability; and the latter executed a full acquittance and discharge of the former's indebtedness as guardian. The settlement was made out of court, but the ward's acquittance was filed in the probate court, and thereupon, without further account, a decree was entered, discharging the guardian from further liability. The complainant, James W., became twenty-one, February 25, 1878, two years and nine months after the agreement of settlement, and about one year and eight months after the execution of titles and release. James W., the ward, took possession immediately after the agreement of settlement was entered into, remained in possession, and was never heard to complain until shortly before this bill was filed, November 11, 1881. This was more than five years after the interchange of titles, and some three years and eight or nine months after James W. reached his majority. During all this time he retained the possession and use of the property he acquired in the settlement.

The property conveyed in payment was probably worth not



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more than half the sum of the guardian's indebtedness at that time; and it is not controverted that if the said James W. had expressed his dissent in a reasonable time, the settlement and discharge would have been set aside.—*Bergen v. Udall*, 31 Barb. 9; *Ferguson v. Lowery*, 54 Ala. 510; *Baines v. Barnes*, 64 Ala. 375; *Holt v. Agnew*, 67 Ala. 360; *Humphreys v. Burleson*, 72 Ala. 1.

It is contended, however, that there has been too long acquiescence, and too many acts of ratification to allow the settlement to be now overhauled. So, the single inquiry is, has there, or has there not, been a ratification and too long acquiescence in this case, to allow the settlement to be opened.

Contracts of purchase, even of lands, made by infants, are not void. They are only voidable, at the infant's instance, and when the infant becomes of age, if he, with a knowledge of all the facts, ratifies the contract, he can not be heard to complain afterwards, unless he can show some fraud perpetrated upon him. And, if after attaining to his majority, such infant contractor, being cognizant of all the facts, deal with the property in a manner inconsistent with his right to rescind, or wait an unreasonable time before he asserts his right of rescission, either of these is a constructive ratification, and the contract will be upheld. This is the rule when the contract has been simply one between an adult and an infant, without any special relations of trust or confidence between them.

When, however, the contract has not only been between an adult and a minor, but, in addition, the parties sustained the relation to each other of trustee and *cestui que trust*, the courts exercise a narrower scrutiny of the transaction, and exact fuller and clearer proof of fairness before yielding their sanction of such transaction. And even if the relation of trustee and beneficiary has terminated, courts regard with distrust and *prima facie* disapprobation, all dealings in property between them, until a sufficient time has elapsed for all presumption of undue influence to have ceased. And there are sound reasons for such a rule. The trustee stands as a guardian, protector, and, in many cases, the adviser of the *cestui que trust*. He must bestow the same care, diligence and watchfulness upon the personal and pecuniary interests confided to him, as an ordinarily prudent man bestows on his own similar interests. He is placed there, not in his own, but in another's interest. He is on watch, not of his own, but of another's property-rights. He should not, and can not rightfully strike a bargain with his beneficiary, which he would not advise and approve, if proposed by a stranger; and when he attempts to deal with his beneficiary, he is placed in the repugnant, dual attitude of being forced by duty to give his counsel, watchfulness, best

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judgment and trading capacity to another, against his own personal, pecuniary interest, if antagonistic. In *Dunbar v. Tredennick*, 2 Ball & Beatty, 304, a case presenting the question we are considering, the Lord Chancellor said: Such transaction could not be upheld, "unless [the trustee] could satisfy the court that it was a transaction perfectly fair in all its parts, that it was such a dealing as he would have advised his employer to have entered into with a third person; and that he had given all the advice against himself, that he would against another,"—*Huguenin v. Baseley*, 14 Ves. 273; s. c. Lead. Ca. in Eq., Vol. 2, Part 2, 556, and notes; *McCormick v. Malin*, 5 Blackf. 509; *Lee v. Lee*, 67 Ala. 406.

As we have said, the presumption of undue advantage is much more difficult to overcome, when the relation of trustee and *cestui que trust* has existed, than when it rests on the simple ground, that one of the contracting parties was an infant. So, the rule of evidence is much more exacting, when it is sought to show a ratification of such voidable contract. In *Thompson v. Lee*, 31 Ala. 292, quoting from *Dunbar v. Tredennick*, *supra*, it was said: "To give validity to such confirmation, it must be shown that the party was fully acquainted with his rights; that he knew the transaction to be impeachable which he was about to confirm; and that with this knowledge, and under no influence, he freely and spontaneously executed the deed." The same language in substance is employed in the following cases: *Murray v. Palmer*, 2 Sch. & Lef. 474; *Fish v. Miller*, 1 Hoffm. Ch. 267; *Butler v. Haskell*, 4 Desa. 651, 716; *McCants v. Bee*, 1 McCord's Ch. 383; *Boyd v. Hawkins*, 2 Dev. Eq. 195, 215. In *Cumberland Coal & Iron Co. v. Sherman*, 20 Md. 117, 134, is this language: "The *cestui que trust* must not only have been acquainted with the facts, but apprised of the law, how those facts will be dealt with, if brought before a court of equity." Of similar import is *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 468; *Pairo v. Vickery*, 37 Md. 467.

In Pomeroy's recent and excellent treatise on Equity Jurisprudence is this language: "Where an ignorance or misapprehension of the law, even without any positive, incorrect, or misleading words or incidental acts, occurs in a transaction concerning the trust, between two parties holding close relations of trust and confidence, injuriously affecting the one who reposes the confidence, equity will, in general, relieve the one who has thus been injured. The relations of trustee and *cestui que trust*, guardian and ward, and the like, are examples. The relief is here based upon the close confidence reposed; upon the duty of the trustee to act in the most perfect good faith, to consult the interests of the beneficiary, not to mislead him, and

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not even to suffer him to be misled, when such a result can be prevented by reasonable diligence and prudence.”—Vol. 2, § 848.

It may seem to be going an extreme length, when it is asserted that to render a ratification binding in such case, the party to be affected must be “apprised of the law.” It is difficult, however, to discriminate between “knowing a transaction to be impeachable,” and being “apprised of the law,” which alone determines when and how it is impeachable.

In the settlement made between Henry E. Voltz, the guardian, and James W. Voltz, the ward, the payment was made in personal property, in value probably less than one thousand dollars, and in a tract of two hundred acres of land. In fixing the value of the land, the witnesses vary from eighteen hundred to fifty-five hundred dollars. We feel we are in safe bounds, when we affirm that the lands, improved as they were, were not worth exceeding thirty-five hundred dollars. Aggregated, these sums are less than half the indebtedness, of which they were given and accepted as payment. The lands so conveyed were the statutory separate estate of Mrs. Voltz, the wife of Henry E. Voltz; but James W. Voltz knew that fact when he accepted the conveyance. It is contended for appellant that the conclusive presumption, that all men know the law, applies in this case, and that, therefore, it must be conclusively presumed that James W. Voltz knew, from the beginning, that the deed he obtained to the lands, being a conveyance of the wife’s statutory separate estate in payment of her husband’s debt, vested no title in him.—*Lee v. Tannenbaum*, 62 Ala. 501; *Prince v. Prince*, 67 Ala. 565.

The deed from Henry E. Voltz and wife to James W. Voltz, given in settlement in June, 1876, contains full covenants of warranty. It conveyed absolutely no title, for they were incapable of conveying a title, on such consideration. The consequence is, that the covenant was broken as soon as it was entered into. Henry E. Voltz having conveyed his property away, and being probably insolvent, it might present a grave question whether James W. Voltz is not entitled to relief, even if there were no question of infancy, or confidential relation in this cause. But we do not decide this question.

In all the stages of this case—the agreement to settle, the relief of the minor’s disabilities, the execution of titles after they were relieved,—James W. Voltz was without independent legal counsel; and he was not advised by his guardian to consult such counsel. As matter of fact, he did not know his title to the land was bad, until a few days before he filed this bill. He had pledged his honor he would abide by the settlement, he had ratified it after he was relieved of the disabilities of minor



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ity, and we are forced to the conclusion he did not "know the transaction was impeachable," until so informed by counsel of his own selection. After this, there was no delay in asserting his rights. This is a complete answer to the objection of staleness, or undue delay, under all the authorities.—*Greenlees v. Greenlees*, 62 Ala. 330; *Jackson v. Harris*, 66 Ala. 565. In the matter of want of knowledge that the title acquired was worthless, this case appears to be distinguishable from *Kern v. Burnham*, 28 Ala. 428.

The bill, as originally framed, contained no offer to surrender up the deed to be cancelled, to account for the property received, or otherwise to do equity. On April 11th, 1882, there was a demurrer interposed, assigning this omission among other grounds. On the 27th October, 1882, the bill, by leave of the court, was amended, by adding to one of the sections the words, "And complainant hereby offers to do in the premises whatever the court shall direct." There was no demurrer filed to this. If there had been a demurrer to the bill as amended, it is scarcely sufficient.—*Br. Bank v. Strother*, 15 Ala. 54; *Rogers v. Torbut*, 58 Ala. 523; *Eslava v. Crampton*, 61 Ala. 507; *Security Loan Association v. Lake*, 69 Ala. 456; *Eureka Company v. Edwards*, 71 Ala. 248. But the defect was clearly amendable—did not go to the substantial merits of the case—and could be reached only by demurrer. *Hooper v. S. & M. R. R. Co.*, 69 Ala. 529; *Jones v. Latham*, 70 Ala. 164; 1 Brick. Dig. 778, § 63. This amendment, although, perhaps, too general for accurate pleading, was, nevertheless, an attempt to heal the defect objected to. Can the demurrer previously filed be visited on the amendment subsequently allowed? To so hold, it would seem, would be to give to the demurrant a great advantage. By resting on his first demurrer, he would invoke no direct adjudication on the sufficiency of the amendment; and if it should turn out that the amendment did not completely obviate the objections raised by the demurrer, a reversal in this court would follow, attended by remandment, amendment in the court below, and a re-trial of the cause, after much delay and expense. We are speaking, of course, of defects in pleading, which do not go to the substantial equity of the bill, but are always amendable at any time before final decree. If the bill be substantially wanting in equity, different rules should prevail. On this question, it is not perceived that any difference should obtain in the practice in equity, and in common-law courts. In the latter, if there is an amendment after demurrer to the count or complaint, the sufficiency of the amended pleading is not raised, without a new demurrer, or a re-filing of the former one to the new state of the pleading, if deemed sufficiently specific. In other words,

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the demurrant must show by the record that he has formally invoked the judgment of the court upon the sufficiency of the amendment—whether it has corrected the defect pointed out and relied on by the original demurrer. There is nothing in this record which shows this course has been pursued. There is neither hardship nor inconvenience in requiring this practice to be pursued. See *Moore v. Armstrong*, 9 Por. 697; 1 Dan. Ch. Pr. (5th Ed.) 582.

In *Gaillard v. Duke*, 57 Ala. 619, there was a contestation whether the administrator, who was one of the distributees, had received money, and how much, by way of advancement. There was demurrer to the allegations, assigning several grounds—one objection being, that they were not sworn to. The court sustained the demurrer as to the *other objections*, but overruled it as to the want of affidavit. Amended allegations were then filed, conforming to the rulings on demurrer, but without affidavit. There was no new demurrer to the amended allegations. This court said: "If it was the purpose of the appellant to insist that the amended allegations were defective because not sworn to, he should have demurred to them also for that reason. The contention can not be made upon the former pleading, which has become *functus officio*."

After the present suit was commenced, an attempt was made to heal the imperfection in the title made by Henry E. Voltz and wife. A chancery decree was obtained, relieving her of the disabilities of coverture, under section 2731 of the Code of 1876. The petition for the purpose failed to aver that she owned any separate estate, and hence, failed to show jurisdiction in the court.—*Cohen v. Wollner, Hirschberg & Co.*, 72 Ala. 233. Her later deed tendered was imperfect and inoperative, like the first.

It is contended for appellant that, when the deed from Henry E. Voltz and wife was executed to James W. Voltz, the former verbally agreed with his wife to convey to her another place, called the River place instead of the Chestnut place—the place in controversy—and that, carrying out that agreement, he did convey to her the said River place, before this bill was filed. It is further contended that the River place is of greater value than the Chesnut place; and the exchange being beneficial to the wife, chancery would approve it, and confirm the trade.

Conceding this to be true, it must and will be conceded that, as matters now stand, James W. Voltz has not a good title; and he is not bound to accept that which requires litigation with its delay, expense and uncertainties, to secure to him an indefeasible title.—*Walton v. Bonham*, 24 Ala. 513. Besides, the conveyance of the River place, made as it was just before this suit was brought, derives no strength or support from the

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oral promise previously given.—*Hubbard v. Allen*, 59 Ala. 283. Much difficulty and uncertainty might arise, if the conveyance of the River place should be assailed, as being in excess of what Henry E. Voltz owed his wife. There is not enough in this record to make it absolutely certain that James W. Voltz can acquire a perfectly good title to the Chesnut place, even at the end of a suit.

Other questions have been urged on our consideration. By the decree of the chancellor, the settlement of Henry E. Voltz with his ward, James W. Voltz, agreed upon in May, 1875, and consummated by conveyance of the land made in 1876 by Henry E. Voltz and wife, and the release and acquittance executed by James W. Voltz, were “set aside, vacated and annulled.” The decree, however, did not require James W. Voltz to surrender back the possession of the lands, nor to deliver up the deed to be cancelled. It is contended the decree was erroneous, because it failed to make this further order.

It is further objected that, in giving instructions to the register, the chancellor did not go far enough. On the 23rd February, 1873, Henry E. Voltz had made an annual settlement with his ward, by which there was ascertained and decreed to be due the latter the sum of \$9473.76. The register was instructed, in stating the account against the guardian, to charge him with this decreed sum, and interest thereon; and to allow him as credits such amounts as might be shown to have been properly expended for the ward, between the time that annual settlement was made, and the settlement agreed on between Henry E. and James W. Voltz. It is not controverted that the settlement of February 23rd, 1873, is *prima facie* correct, and stands as an adjudication between the parties, unless contested according to the statute.—Code of 1876, §§ 2531, 2594. The objection is, that, in giving this direction, the chancellor failed to provide for the re-examination of any item included in previous settlements.

It is further objected that, in giving instructions to the register in the matter of taking the account, the chancellor omitted to charge James W. Voltz with rents of the lands while in his possession.

Notwithstanding the decree in this cause did not finally determine all the details of relief, it was nevertheless a final decree, in that sense which will support an appeal. “The test of a final decree, so as to support an appeal, is not whether the cause is still in progress in the court of chancery, awaiting further proceedings which may be necessary to entitle the parties to the full possession and enjoyment of the rights it has been declared they have, but whether a decree has been rendered, settling these rights.”—*Jones v. Wilson*, 54 Ala. 50, and author-



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ities cited. A decree may be partly final, and partly interlocutory.—*Malone v. Marriott*, 64 Ala. 486. And we may add, it is rarely the case that a chancery decree, even though final in its character so as to support an appeal, settles all the questions necessary to render complete relief. This is almost universally so, when the bill is one for redemption; or, for any other cause, an account has to be taken before the final orders can be made. As was said in *Cochran v. Miller*, 74 Ala. 50, “If it [the decree] settle all the equities between the parties, it is, to that extent, final. If it is necessary to take an account, or other proceeding must be had to carry it into effect, to this last named extent it is interlocutory, and may be moulded, modified or altered by the chancellor, as any other interlocutory decree may be. The principles of relief can not be altered, for they are final. Directions for carrying the decree into effect may be altered, for they are interlocutory.” The decree rendered was final, and justified the appeal taken. If it had not been final, the appeal would not have lain. It settled and declared that the settlement between Henry E. and James W. Voltz, agreed on in May, 1875, and consummated in June, 1876, “be set aside, vacated and annulled,” and that another and final settlement be made between the guardian and ward. We say this settled the equities, because all else was mere details in settling the account, and carrying the decree into effect. As to such details, if the chancellor gave directions which were not full enough, or even erroneous, these being interlocutory, he could afterwards modify them on motion of either party. If some orders necessary to a full and complete execution of the decree were omitted, he could supply them afterwards.—*Cochran v. Miller*, *supra*.

Applying these principles to this case. It is necessary to a complete determination of this cause, that the deed from Henry E. Voltz and wife to James W. Voltz be surrendered up and cancelled, under the direction of the court, and that the possession of the premises be surrendered back to the grantors. It is not necessary, however, that this order should have been made in the first instance. The condition of crops planted and growing should be taken into the account, and the final order should be made, when it can be done with as little damage to the parties as possible.—Code of 1876, §§ 2949, 2950. The chancellor has much better means of determining this question advisedly than we can have. This pertains to the execution of the decree, and not to the equity of the bill.

So, in the matter of taking the account. If either party desires to go behind the decree of 1873 on partial settlement, this is a question of fuller instructions to the register, which either party is entitled to, on petition or motion therefor. And James

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W. Voltz is liable for rents of the land while in his possession, with interest from the end of each year, subject to discount for taxes paid, and for permanent improvements, if any remain which were placed there by him.—Code of 1876, §§ 2951 *et seq.* But this fund being income and profit of Mrs. Voltz' statutory separate estate, a difficulty arises in the matter of its administration. The statute declares that all the property of the wife is her separate estate, not subject to the payment of the debts of the husband; that it vests in the husband as her trustee, who has the right to manage and control the same, and is not required to account with the wife, her heirs or legal representatives, for the rents, income and profits thereof; but such rents, income and profits are not subject to the payment of the debts of the husband.—Code of 1876, §§ 2705–6.

We have many times had occasion to consider the power of the husband over the wife's property, and its income and profits. In *Lee v. Tannenbaum*, 62 Ala. 501, we said: "The right and title to property thus situated is secured to the wife, yet without power in her to charge it, save to a limited extent; that the husband has neither right nor title to the property, yet, as trustee, may manage and control it, and invest its proceeds, when in money, or converted into money; that the rents, income and profits pass to him as trustee, but there is no mode provided for making him account for them; and yet they are not liable to his debts. True, the rents, income and profits are committed to him in confidence that he will employ them in support and maintenance of the family; but this is only a moral or imperfect duty. Its performance can not be compelled, though he might be removed from the trust for a clear disregard of this obligation." The law can not coerce the payment of the husband's debts, either out of the *corpus*, or the income and profits of the wife's statutory estate, save to the extent, and in the manner provided in section 2711 of the Code. Yet, if the husband dispose of the wife's property illegally, and she sue to recover it back, she can not recover the income and profits, because her husband is entitled to the possession and administration of them; and he, by disposing of the property, has parted with all the possessory right and interest he had, and estopped himself from recovering back that which he bargained away.—*Whitman v. Abernathy*, 33 Ala. 160; *Ryall v. Prince*, 71 Ala. 66; *Chapman v. Abrahams*, 61 Ala. 108.

According to the principles above declared, neither Henry E. Voltz nor his wife can recover the rents, by any active measure of relief. He is estopped, because, having parted with the land in payment of a debt standing against him, and by a conveyance binding on him, he can not be heard to say James

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W.'s possession was tortious or illegal. Nor can the wife recover, because her only authority would arise as an incident to the recovery of the land itself; and then, the recovery, so far as rents and profits are concerned, would be for the use of her husband, as her trustee. He having estopped himself, she can not recover in his right.—*Whitman v. Abernathy, supra; Daffron v. Crump*, 69 Ala. 77.

The rents in the present case must be treated as if they had been realized, and then paid by Henry E. Voltz, to James W. in part liquidation of the indebtedness of the former. It is a good payment *pro tanto*; it can not be recovered back from him, and he must be charged with it in the account. From the sum of these must be deducted any taxes he may have paid, and the present value of any valuable, permanent improvements he may have put on the land.

None of these questions enter into the final decree proper. They pertain to the execution of the reference, and are interlocutory in their character. They can not become the subject of assigned error, until the account is taken, and finally decreed on. Neither of the three objections urged is now in a condition to be the ground of a reversal.—*Cochran v. Miller, supra*.

The decree of the chancellor is affirmed.

BRICKELL, C. J., dissenting.

## Bland v. The State.

### *Indictment for Murder.*

1. *Order setting day for trial of capital case; Section 4874 of Code, 1876, construed.*—Construing section 4874 of the Code of 1876, the court re-affirms *Floyd v. State*, 55 Ala. 61; *Shelton v. State*, 73 Ala. 5; *Posey v. State*, *Ib.* 490.

2. *Same; when error in recital in judgment-entry of conviction not reversible.*—When the clerk, in attempting, by way of recital, to repeat in the judgment-entry of the trial and conviction of a defendant in a capital case, the order for summoning a jury previously made, fails to copy it correctly, the order first made will be regarded on appeal as the correct and controlling one, and the recital being unnecessary, the error therein will not work a reversal.

3. *When charge as to weight of circumstantial evidence properly refused.* A charge requested by the defendant in a criminal case, instructing the jury that, to authorize a conviction on circumstantial evidence, "the evidence should be as strong as the positive testimony of one creditable witness, who proves beyond all reasonable doubt the guilt of the defendant," is improper and misleading.

4. *Murder; when refusal to charge as requested free from error.*



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Where, on appeal by a defendant indicted for murder, all the evidence is not set out in the bill of exceptions, this court can not say that the primary court erred in refusing a charge requested by the defendant, which instructed the jury, in effect, that unless they were convinced that he was guilty of murder in the first degree, he could not be convicted of any crime; as, under such an indictment, a defendant may be convicted of murder in the first or second degree, or of manslaughter in the first or second degree.

## APPEAL from Chilton Circuit Court.

Tried before Hon. JAMES E. COBB.

Alonzo Bland, the defendant in the court below, appellant here, was indicted for the murder of Nancy Bland, who, as the evidence showed, was his mother; and, at a subsequent term, he was tried and convicted of murder in the first degree, and sentenced to imprisonment in the penitentiary for life. On the trial it was shown that on 31st December, 1882, the deceased was killed by a pistol shot. The bill of exceptions does not set out all the evidence. It recites, among other things, that "the testimony tending to connect the defendant with the killing was entirely circumstantial." The defendant requested the court in writing to give the following charges to the jury:

1. "To convict the defendant, the evidence should be as strong as the positive testimony of one creditable witness, who proves, beyond all reasonable doubt, the guilt of the defendant."
2. "Before the jury can find the defendant guilty, they must be convinced by the evidence, to a moral certainty, and beyond all reasonable doubt, that the deceased came to her death by a pistol shot, and that the State must prove, to a moral certainty, and beyond all reasonable doubt, that the pistol was fired by the defendant with a formed design to kill the deceased." The court refused to give the charges, and the defendant duly excepted; and these rulings are here assigned as error.

A. A. WILEY, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—In the preliminary order, setting the day, and ordering the sheriff to summon persons for the trial of the prisoner, the circuit court followed the statute, Code of 1876, § 4874, as we have construed it in *Floyd v. The State*, 55 Ala. 61, *Shelton v. The State*, 73 Ala. 5, and in the case of *Posey v. The State*, 73 Ala. 490.

In the judgment entry of the trial and conviction, the clerk attempted, by way of recital, to repeat the order for summoning a jury, previously made; and in the attempt, failed to copy correctly. This was wholly unnecessary, and we will re-

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gard the order first made as the correct and controlling one. The first was the order of the court; the last the error of the clerk.

The first charge asked and refused is in the precise language of that held improper and misleading, in *Mickle v. The State*, 27 Ala. 20, and in *Faulk v. The State*, 55 Ala. 415.

The second charge asked, so far as we can perceive, was rightly refused. It, in effect asked, that unless the jury were convinced the defendant was guilty of murder in the first degree, he could not be convicted of any thing. The record informs us it does not contain all the evidence. Under the indictment in this case, there could have been a conviction of murder in the first or second degree, or of manslaughter in the first or second degree. We can not know there was not testimony tending to show the defendant was guilty of some other grade of homicide. We are bound to suppose, in support of the court's ruling, there was such testimony, in the absence of its negation in the record. It would require a very strong and clear case to justify the charge asked.—*Ex parte Nettles*, 58 Ala. 268; *Mitchell v. The State*, 60 Ala. 26; Clark's Manual, § 480; *Glaze v. Blake*, 56 Ala. 379; *Williams v. Barksdale*, 58 Ala. 288.

The judgment of the circuit court is affirmed.

# CASES

IN THE

## SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1884.

### Jarrell, Ex'r, v. Payne.

#### *Settlement of Insolvent Estate in Probate Court.*

1. *Homestead to widow and minor children; by whom return made under § 2841, of Code.*—The duty of making the report or return of homestead or other exemption claimed by the widow or guardian of minor children, etc., as provided by section 2841 of the Code of 1876, when the claim or selection has been made without the intervention of commissioners, rests on the personal representative, although the statute is silent as to the person by whom the report or return should be made.

2. *Same; when selection necessary.*—Although there is no express direction or provision in the statute for selecting the homestead by or for the widow or minor children of a decedent, when the family resided thereon at the time of the decedent's death, yet, such selection must be made, when the tract consists of more acres, or is of greater value than can be claimed as exempt.

3. *Same; when selection unnecessary.*—But when, as in this case, the whole tract does not exceed the quantity and value the law exempts in favor of the widow or minor children, no selection is necessary: but all that is required in such case is, that the claim should be asserted or made known before the personal representative acquires dominion over it for the purposes of administration, or some creditor procures its sale for the payment of debts.

4. *Same; should be reported under § 2841 of the Code, though not laid off by commissioners.*—Under section 2841 of the Code of 1876, the homestead or other exemption in favor of the widow or minor children should be reported to the probate court, within sixty days after it is claimed, although commissioners were not appointed to lay it off. (*Farley v. Rioridon*, 72 Ala. 128, on this point, qualified.)

5. *Same; negligence of personal representative to report; liability for.* The failure of the personal representative to make such report, as required by the statute, fixes on him a *prima facie* liability for negligence, and casts on him the burden of exculpation; and the measure of his liability, the estate having been declared insolvent, is the injury resulting to the creditors of the estate from such failure.

6. *Same; when personal representative not liable for rents of homestead.* In such case, the personal representative fully exonerates himself from liability, by showing that the homestead did not exceed, in quantity, eighty acres, or, in value, one thousand dollars, and that it had been occu-



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pied, since the decedent's death, by the widow under an asserted claim of homestead on behalf of herself and minor child, to which he had assented; and hence, on proof of these facts on final settlement made by him after declaration of insolvency, he is not chargeable with the rent of the homestead.

APPEAL from Tallapoosa Probate Court.

Tried before Hon. R. A. J. CUMBEE.

The facts are stated in the opinion.

A. D. STURDIVANT, for appellant.

W. D. BULGER, *contra*.

STONE, C. J.—This case presents the question of homestead and other exemptions in a form different from any heretofore considered. We have considered the question in many phases; where such property was sought to be subjected to sale under legal process, and where it was sought to be brought under the dominion of administration, for the payment of debts, or for distribution. In all such cases, we have held that exemption is a privilege to be claimed; and if not claimed until the property has been subjected to sale, our ruling has been that the right is lost. We have taken a further step, and held that if the homestead is to be severed from a larger tract, or the exempt personalty from a larger bulk, the selection of the exempt portion must be made before sale, or the right is lost. And the claim of exemption, to be successful, must not be in excess of that allowed by law.—*Tucker v. Henderson*, 63 Ala. 280; *Martin v. Lile*, *Ib.* 406; *Simpson v. Simpson*, 30 Ala. 225; *Bell v. Davis*, 42 Ala. 460; *Henderson v. Tucker*, 70 Ala. 381; *Wright v. Grabfelder*, 74 Ala. 460; *Barber v. Williams*, *Ib.* 331; *Spencer v. Clark* [*ante*, p. 49].

In the present case, there has been no attempt to subject the land or personal property to sale, either under legal process, or under an order of the probate court. The exact case is as follows: John T. Jarrell died, leaving a last will, and appointing William G. Jarrell to be executor thereof. The will was probated, and the executor qualified. Testator left a surviving widow and one infant child. He owned and occupied eighty acres of land at the time of his death, and personal property, valued by the appraisers at two hundred and sixty-five dollars. The testimony declares this was the only property he owned, and that the land was occupied by testator as a homestead at the time of his death, and was worth not exceeding one thousand dollars. It has ever since been occupied by the widow and child as a homestead. The report of the appraisers states, "the following articles" (the entire personal assets) "are selected and

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set apart for widow and minor child under section 2824 of the Code." No report appears to have been made by any one in reference to the homestead, and it does not appear that the executor ever interfered with it in any way, or made any effort to sell it, rent it, or to obtain possession of it. The estate was reported and declared insolvent, and the executor filed his account for a final settlement, charging himself with little or no assets, but claiming credit for expenses of administration. Creditors filed exceptions to the account current, and succeeded in establishing a charge against him, made up chiefly of rents of said eighty acres of land, which it was alleged the executor ought to have realized. Exceptions were reserved to these rulings, and this presents the question for our determination.

The statute makes express provision for reporting claim of homestead in the following cases: Sections 2828-9 of the Code of 1876 provide for the declaration and recording of such claim before any process is levied upon it. Sections 2832 and 2834 provide for reporting such claim, when no claim has been made before, but is made after process levied. Section 2840 makes provision for selecting the homestead, "when any resident of this State dies, leaving a widow or minor child or children, one or both, and such resident owned lands, or an interest therein in this State, but did not at the time of his death reside on a homestead owned by him, of the value of two thousand dollars." There is no express direction or provision for selecting the homestead by or for the widow or minor children, when the family resided on the homestead at the time of the husband's death. Yet, section 2841 declares that "when homestead or exemption is claimed by the widow or guardian of the minors, or by commissioners appointed by the judge of probate under any of the provisions of this chapter [the whole subject of exemptions], the same shall be returned to the probate court having jurisdiction of the estate within sixty days thereafter," etc. The statute is silent as to the person who shall make the report in a case circumstanced as this is; as silent as it is as to the manner of asserting the claim, or making the selection. On whom does the duty rest of making the return? We think we best promote the policy and symmetry of the law by holding that this duty rests on the personal representative.

When the tract consists of more acres, or is of greater value than can be claimed as exempt homestead, there must be a selection of the part claimed. This is indispensable, for otherwise it can not be known of what the homestead consists, nor whether the claim is excessive. But when, as in this case, the whole tract does not exceed the quantity the law exempts, there is no room for selection, unless the value exceeds two

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thousand dollars. That is not asserted in this case, and the proof shows it did not exceed one thousand dollars in value. It follows that all the law required in this case was, that the claim should be asserted or made known, before the personal representative acquired dominion over it for purposes of administration, or some creditor procured its sale for the payment of debts.—*Keel v. Larkin*, 72 Ala. 493. Section 2827 of the Code declares that “the homestead exempted for the benefit of the widow and minor child or children, under this chapter, may be retained by such widow, or by such child or children, until it is ascertained whether the estate is solvent or insolvent; and if the estate is insolvent, shall vest in them absolutely.”

There is, in substance, no difference between the right of homestead asserted in this case, and the kindred right of exempt personal property, claimed by the widow or minor children. In *Mitcham v. Moore*, 73 Ala. 542, this court said: “The right of exemption is not dependent upon the existence of an administration. The purpose of making it is the maintenance of the widow and minor children, a purpose which could not often be accomplished, if the right was dependent on the existence of an administration. . . . And so it may occur that if there was a grant of an administration, the personal property which would pass to the personal representative would not equal the value of the exemption. There would be no duty in reference to it to be performed by the personal representative, except that of permitting the selection to be made. The grant of administration would be, as to such property, merely formal and ceremonious, creating unnecessary expense, and diminishing the value of the exemption.”

In the case of *Farley v. Riordon*, 72 Ala. 128, we find this remark: “The clause having reference to the ‘sixty days’ [in § 2841 of the Code] seems to have no field for operation except in those cases where commissioners are appointed, and it becomes their duty to make report.” This opinion is not absolutely declared, and must be considered in connection with the sentence immediately preceding it, and with the facts of that case. It was not absolutely necessary to the opinion then pronounced, and we do not feel bound by it, so as to preclude further inquiry into it. The present case makes it our duty to inquire, whether there should not have been a report of the claim of homestead, although commissioners were not appointed to lay it off. The language of the statute—Code, § 2841—is, “When homestead or exemption is claimed by the widow or guardian of the minor, or by commissioners appointed by the judge of probate under any of the provisions of this chapter, the same shall be returned to the probate court



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having jurisdiction of the estate within sixty days thereafter." This statute expressly requires the return to be made, whether the claim is asserted by the widow, the guardian of the minors, or is allotted by commissioners. And the reason is obvious. The policy, as well as the provisions of our statutes, securing homestead and other exemptions, is, that the proceeding shall not be *ex parte*, but subject to judicial contestation. And that contest can not be inaugurated unless the claim or allotment be returned to the court. We think the claim should be returned, or reported to the court, no matter how asserted, in all cases of decedents' estates; and, as stated above, we hold it to be the duty of the personal representative to make the return, whenever the claim or selection has been made without the intervention of commissioners. The charge of rents against the executor, made in this case, must have rested on his failure to return, or report the claim of homestead; for it has no other foundation to rest on.

The only testimony in this record bearing on the question under discussion is that of the executor himself. He testified as follows: "That said John T. Jarrell died on or about the 20th day of September, 1881, leaving surviving him his widow, Mrs. Jane Jarrell, and Luke M. Jarrell, a minor child of hers, who were members of his family at the time of his death; and that the lands on which his dwelling was located, and on which he resided last before his death, consisted of about eighty acres only, and that the said lands and improvements thereon did not exceed in value one thousand dollars at the very highest estimate; and that the same are situate, lying, and being in the county of Tallapoosa, State of Alabama; and that the widow of said deceased, Mrs. Jane Jarrell, had asserted her right and claim to said land and dwelling situated thereon, as a homestead for herself and minor child of said decedent, exempt from the payment of debts contracted after the 23d day of April, 1873; that he recognized the right of said widow and minor child to said premises as a homestead, and assented thereto; and that said widow had continued to exercise control and dominion over said premises, as a homestead for herself and minor child of said deceased, up to the present time."

On the principles declared above, and which we decide to be the true rule, the executor must be held accountable as for negligence in failing to return the claim of homestead. What is the effect of this neglect, so far as his liability is concerned? On principle, the measure of his liability is the injury the creditors suffered by the failure. The failure of a sheriff to levy an execution in his hands on property found in the defendant's possession, furnishes an analogy. Such failure fixes on the sheriff a *prima facie* liability, but it is only *prima facie*. It

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casts on the sheriff the burden of exculpation. The presumption is overcome, if the sheriff prove the property was not subject to the process, or would have yielded nothing.—*Wilson v. Strobach*, 59 Ala. 488; *Abbott v. Gillespy*, [*ante*, p. 180]. So, in this case, when the executor proved that his failure to return the claim of homestead injured no one, he fully met and neutralized every element of damage to the creditors, which the law, in the absence of such explanation, would presume from this neglect of duty. In the present case, the testimony clearly shows the claim of homestead was just, and was not excessive. There is no attempt to prove the contrary. If the claim had been returned to the probate court, it is not likely there would have been any contest. If there had been, it would have amounted to nothing, except to entail unnecessary expense, if the facts are properly set forth in this record. *Damnum absque injuria*.

Reversed and remanded.

## Washington v. The State.

### *Indictment for Illegal Voting.*

1. *Elective franchise ; nature of.*—The elective franchise is a privilege rather than a right, granted or denied on grounds of public policy, and is the subject of exclusive regulation by the State, limited only by the provisions of the Fifteenth Amendment to the Federal Constitution, which prohibits any discrimination on account of "race, color, or previous condition of servitude."

2. *Same ; section 3, art. viii of State Constitution construed.*—Section 3 of article VIII of the Constitution of 1875, denying the privilege of registering, voting and holding office to those "who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny," etc., disqualify from participation in the elective franchise all persons convicted of any one of the specified crimes prior to the adoption of the Constitution, as well as those thereafter convicted; and hence, a person convicted of larceny in 1871 may be convicted under the statute for voting at a general election held in August, 1884.

3. *Same ; section 3 art. viii of State Constitution neither ex post facto nor in nature of bill of attainder.*—Section 3 of article VIII of Constitution, as thus construed, not taking away a legal right, nor imposing a legal burden, and requiring a conviction in the due course of judicial proceedings before disfranchisement, is neither an *ex post facto* law, nor a provision in the nature of a bill of attainder, within the meaning of the Federal Constitution.

APPEAL from Tuscaloosa Circuit Court.

Tried before Hon. S. H. SPROTT.

The facts are sufficiently stated in the opinion.

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MARTIN & MARTIN, for appellant, contended that section 3 of article 8 of the Constitution was not retroactive, but merely disqualified persons convicted of the designated crimes after its adoption.

T. N. McCLELLAND, Attorney-General, for the State.—The case comes clearly within both the letter and spirit of section 3, article 8 of the Constitution of 1875, the purpose of which was to purify the ballot box by excluding all dishonest and infamous men from participation in popular elections. To accomplish this, it must be construed to be retrospective according to its letter. The ballot is, moreover, a privilege conferred by the State, and may be conferred or taken away at pleasure. It is, in no sense, a vested right.—Cooley's Con. Lim. (5th Ed.) 752. The restriction of the right in this case is a mere qualification for suffrage, and was not intended as a punishment.—Pom. Const. Law, § 535. The case does not come within the principle decided in the cases of *Cummings* and *Garland*, 4 Wall. 277 and 333. The right to pursue a profession is a natural right; the right to vote is one acquired only by law from the State. The provision in question has no element of an *ex post facto* law, because it imposes no penalty for any thing.—McCreary on Elec. § 3; Brightley's Elec. Cases, 27.

SOMERVILLE, J.—The defendant is indicted for illegal voting at the general election held in August, 1884, and was convicted on the ground that he had voted while laboring under a constitutional disqualification, having been convicted of the crime of larceny in the year 1871. At the time of his conviction of the latter offense, he was not disqualified by this fact, the Constitution of 1868 being then in force.

Whether the present conviction for illegal voting was right or wrong depends upon the proper construction of section 3, article VIII, of the Constitution of 1875, now the organic law of this State, which reads as follows: "The following classes shall not be permitted to register, vote, or hold office:

"First. Those who *shall have been* convicted of treason, embezzlement of public funds, malfeasance in office, *larceny*, bribery, or other crime punishable by imprisonment in the penitentiary.

"Second. Those who are idiots or insane."

The grade of larceny, whether grand or petit, is immaterial, as this section has been construed by us to embrace both classes of the offense, a conviction of either operating as a disfranchisement and disqualification of every voter coming within its provisions.—*Anderson v. The State*, 72 Ala. 187.

The question for decision is, whether the section under con-



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sideration applies to convictions previous to the adoption of the Constitution, or whether it must be confined to those transpiring subsequently thereto. This is determined greatly by the policy and purpose of its provisions, and the nature of what, in common parlance, is called the right of political suffrage. It may be laid down as a sound proposition, using the language of Mr. Cooley, that "participation in the elective franchise is a *privilege* rather than a *right*, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible, consistent with the public safety."—Cooley's Con. Lim. (5th Ed.) 752 (\*599). Mr. Story, without undertaking to say whether it has its foundation in natural right or not, says it "has always been treated in the practice of nations as a strictly *civil* right, derived from and regulated by each society according to its own free will and pleasure."—1 Story's Const. (4th Ed.) §§ 579–582. The weight of both reason and of authority, however, as we shall see, support the view that political suffrage is not an absolute or natural right, but is a privilege conventionally conferred upon the citizen by the sovereignty. There can be practically no such thing as universal suffrage, and it is believed that no such theory is recognized among any people. Some are necessarily excluded on the ground of infancy, and the privilege is infinitely varied among others, either upon the ground of public policy, or for reasons that seem arbitrary. No one can lawfully vote under any government of laws except those who are expressly authorized by law. It is well settled, therefore, under our form of government, that the right is one conferred by constitutions and statutes, and is the subject of exclusive regulation by the State, limited only by the provisions of the Fifteenth Amendment to the Federal Constitution, which prohibits any discrimination on account of "race, color, or previous condition of servitude."—Cooley's Cons. Lim. (5th Ed.) 752 *et seq.*; McCreary on Elec. (2d Ed.) § 3; Brightley's Elec. Cases, 27; *Huber v. Reiley*, 53 Penn. St. 112. The States having the power to confer or to withhold the right, in such manner as the people may deem best for their welfare, it necessarily follows that they may confer it upon such conditions or qualifications as they may see fit, subject only to the limitation above mentioned. As said in *United States v. Cruikshank*, 92 U. S. (2 Otto), 542, "the right to vote in the States comes from the States; but the right of exemption from political discrimination comes from the United States." It is chiefly upon this theory, that the exclusion of females from the right of voting, although they are deemed citizens, is justified in law, this not being necessarily a privilege or immunity of citizenship. *Minor v. Happersett*, 21 Wall. 162; Morse on Citizenship, § 3.

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The right is also denied almost universally to idiots, insane persons, and minors, upon the ground that they lack the requisite judgment and discretion which fit them for its exercise. It has never been considered that any of these disqualifications were imposed as a punishment, and no one has thought to view them as even in the nature of a penalty. The same may be asserted as to the exclusion of unnaturalized citizens who are disqualified on the ground of alienage, and of paupers, to whom some States deny the right upon principles of State policy. It is quite common also to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. The evil infection of the one is not more fatal than that of the other. The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests. The exclusion must for this reason be adjudged a mere disqualification, imposed for protection, and not for punishment—withholding an honorable privilege, and not denying a personal right or attribute of personal liberty.—Pomeroy on Cons. Law, § 535; *Anderson v. Baker*, 23 Md. 531; *Blair v. Ridgely*, 41 Mo. 63; *Ex parte Stratton*, 1 West Va. 305; *Kring v. Missouri*, 107 U. S. 221.

The clause of the Constitution, which we are now considering, can not, for the foregoing reasons, be considered as either an *ex post facto* law, within the prohibition of section 10, article I, of the United States Constitution, or as in the nature of a bill of attainder. It is free from the latter objection on the ground that it requires a conviction in the due course of judicial proceedings before disfranchisement is made to attach. 2 Story's Const. § 1344; *Martin v. Snowden*, 18 Gratt. (Va.) 100. It is not an *ex post facto* law because it neither takes away a legal right, nor imposes any legal burden, one of which is necessary to the infliction of a penalty. It merely withholds a constitutional privilege, which is grantable or revocable by the sovereign power of the State at pleasure. In this particular the case differs from that of *Ex parte Garland*, 4 Wall. 333, and *Cummings v. The State of Missouri*, *Ib.* 277, where

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a test-oath, obviously punitive in its nature, was held to be unconstitutional, so far as it was required as a prerequisite for the exercise of an ordinary calling, as that of an attorney at law or of a clergyman. The right to exercise these callings was a natural right, which was not conferred by government, but would exist without it, although the subject of legislative regulation. It was a valuable attribute of personal liberty in the nature of property, the deprivation of which was punitive in its character.—Sedgw. on Stat. & Cons. Law (2d Ed., Pomeroy's), p. 558, *note*; Brightley's Elec. Cases, 97, *note*; McCreary on Elec. (2d Ed.) §§ 31–32. Upon a like principle is based the ruling of the United States Supreme Court in another case, where a State statute was held void which excluded persons from the privilege of sustaining suits in the courts of the State, or from making application for rehearings, except upon condition of taking an expurgatory oath, that they had never engaged in hostile measures against the Government.—*Pierce v. Carskadon*, 16 Wall. 234. The fact that no one can exercise the elective franchise unless it is affirmatively and expressly conferred by the constitution or laws of a State, as Mr. Pomeroy observes, shows at once and of itself, "that the voter possesses a mere privilege; that the States have supreme control over this privilege; that taking it away, or what is the same thing, refusing to confer it, does not impair a right, and can not be regarded as a penalty or punishment."—Pomeroy's Cons. Law, § 535.

We may further observe, what follows from the foregoing views, that there can be no such thing as a vested right in the elective franchise as against the State, or people, from which it was *ex gratia* derived, for, under our form of civil polity, all political power is inherent in the people, and "they have," in the language of the Constitution, "at all times an inalienable right to change their form of government, in such manner as they may deem expedient."—Const. 1875, Art. 1, § 3.

These reasons induce us to the conclusion that the framers of the Constitution intended to disqualify from participation in the elective franchise all persons previously convicted of larceny, and other crimes specified, as well as those convicted subsequently to the date of the adoption of that instrument. They both alike come within the letter, as well as the spirit of its provisions touching the subject of suffrage and elections. The mischief to be remedied is not of greater magnitude in the one case than in the other. And as all the provisions of a Constitution must go into effect as a whole, and at the time of its final adoption, unless otherwise declared, no reason appears to us why the operation of the one under consideration should be postponed by judicial construction.



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We discover no error in the ruling of the circuit court, instructing the jury to find the defendant guilty if they believed the evidence; and its judgment is affirmed.

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### *Action by Passenger against Common Carrier for Damages for Failure to deliver Baggage.*

1. *Action against common carrier for failure to deliver baggage ; when description of baggage sufficient.*—In an action by a passenger against a common carrier for damages for failure to deliver baggage, a description of the baggage in the complaint as “one trunk,” containing designated articles of jewelry and merchandise, and “clothing and personal wearing apparel,” is, on demurrer, sufficiently certain.

2. *Same ; what a fatal variance between allegation and proof of contract.*—Where, in an action by a passenger against a corporation operating an intermediate line of railroad, for damages for the failure to deliver baggage, the contract is alleged to have been made with the defendant for the transportation of the baggage to a designated point, which is situate on the last connecting line, to be there delivered to the plaintiff, and the proof shows that the contract was made with the company operating the first connecting line, and is an agreement on the part of the defendant for the transportation and delivery of the baggage, not to the plaintiff at the point of destination, but to the company operating the last connecting line, there is a variance between the allegations and proof, which is fatal to the right of recovery.

3. *Liability of common carrier for baggage ; extent of ; burden of proof.*—Transportation of baggage, as such, is incidental to the carriage of the owner as a passenger, and for its safe delivery, a common carrier is liable in the same manner, and to the same extent as carriers of merchandise; and if the carrier is both the receiving and delivering carrier, or liable for the safe delivery of baggage at the point of destination, proof that it was in good condition when received, and in damaged condition when delivered, casts on him the burden of showing that the damage was occasioned by some cause exempting from absolute liability for safe delivery.

4. *Railroad companies operating connecting lines ; liability for baggage.* An arrangement, express or implied, between different connecting railroad companies, authorizing the companies operating the terminal roads to issue to passengers through tickets, and through checks for baggage, each being entitled only to the fare for transportation over its own line, does not render one of them liable for loss or damage to baggage sustained on the road of the other; nor does it impose on the intermediate company absolute liability for safe delivery, but merely the duty to receive from the company issuing the tickets and checks, to safely carry over its own road, and to deliver to the other connecting company.

5. *Same ; presumptions as to first company in case of non-delivery and delivery in bad order.*—Where the contract of the receiving company is not for delivery beyond the terminus of its line, but merely to the connecting company, liability in case of non-delivery at the point of desti-

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nation, or total loss, is *prima facie* on the receiving company, and on it is cast the burden of showing delivery to the connecting company; but this presumption does not arise in case of a delivery by the connecting company in bad order. (*S. & N. R. R. Co. v. Wood*, 71 Ala. 215, explained and modified.)

6. *Same; presumption against delivering company in case of delivery in bad order.*—As against the delivering or discharging company, the presumption prevails, in the absence of evidence, that the baggage continued in the same condition as when delivered to the receiving company, and on it is cast the burden, in case of delivery in a damaged condition, of showing the condition of the baggage when received by it.

7. *Same; presumption as to intermediate company in case of delivery in bad order by delivering company.*—When baggage is delivered in good order by the receiving company to an intermediate company, and by it delivered to the delivering company, proof that it was in a damaged condition when delivered by the latter at point of destination does not operate, in the absence of other evidence, to cast on the intermediate company the burden of showing that it was in good condition when delivered by it to the delivering company.

8. *Same.*—Hence, in an action by a passenger, having a through ticket and a through check for his baggage over three connecting lines of railroad, operated by separate and independent companies, against the intermediate company for damages for failure to deliver his baggage, which had been received by it in good order from the first company, and which was in a damaged condition when delivered by the last company at the point of destination, no special contract or arrangement between the companies being shown, a charge instructing the jury that if the trunk was delivered to, and received by the defendant in good order, and when it was delivered to the plaintiff at the point of destination, it was badly broken, and its contents taken out, it devolved on the defendant to show that it was delivered in good condition to the delivering company, and if it failed to show this, the plaintiff was entitled to recover, is erroneous.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action by E. V. Culver against the Montgomery and Eufaula Railway Company, a domestic corporation, operating a railroad in this State, for the recovery of damages "for the failure to deliver certain goods, viz., one trunk, containing one heavy set gold bracelets, twenty-four pieces of sterling silver teaspoons, twelve pieces [silver] table spoons, twelve pieces of dessert spoons, one full set of Rogers table cutlery, consisting of about fifty pieces, and clothing and personal wearing apparel, and also one fine coral set breast-pin; which goods were received by defendant as a common carrier, to be delivered to the plaintiff at Birmingham, Alabama, for a reward, which defendant failed to do." The defendant demurred to the complaint, and also to that part thereof "which is in these words, to-wit, 'and clothing and personal wearing apparel,'" on the ground, in substance, that said clothing and wearing apparel were insufficiently described. The court overruled the demurrer, and thereupon the cause was tried on issue joined on the plea of "not guilty,"

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the trial resulting in a verdict and judgment for the plaintiff. The plaintiff requested the court in writing to charge the jury, *inter alia*, as follows: (2) "That this suit, being on an alleged contract, and not on a failure of duty, the jury must find a verdict for the defendant, unless the contract set forth in the complaint is proven to the satisfaction of the jury." This charge the court refused, and the defendant excepted.

The facts disclosed by the evidence, and the other rulings of the primary court, so far as passed on by this court, are stated in the opinion.

ARRINGTON & GRAHAM, for appellant. (1) The demurrer to the complaint should have been sustained. A more specific description of the clothing and wearing apparel should have been stated.—*Posey v. Hair*, 12 Ala. 567; *Chapman v. Weaver*, 19 Ala. 626. (2) The second charge requested by the defendant should have been given. It asserted nothing more than that the plaintiff must establish his case. The plaintiff had sued on a contract, and it devolved on him to prove it. (3) The burden of proof was on the plaintiff to show that the loss of the contents of the trunk occurred on defendant's road, and not on the defendant to show that the loss did not result from its fault, or on its road. This point elaborately discussed with citation of following authorities: *South & North Ala. R. R. Co. v. Wood*, 71 Ala. 215; *Mobile & Girard R. R. Co. v. Copeland*, 63 Ala. 219; Hutch. on Carriers, §§ 106, 108, 759, 760; *Midland R. R. Co. v. Bromley*, 33 Eng. Law & Eq. 235; *Gilbart v. Dale*, 5 Ad. & Ell. 543; *Griffiths v. Lee*, 1 Car. & P. 110; *Anchor Line v. Dater*, 68 Ill. 369; *Chic. & N. W. R. R. Co. v. Northern Line P. Co.*, 70 Ill. 217; *Chicago, etc., R. R. Co. v. Fahey*, 52 Ill. 81 (4 Am. Rep. 587); *Marquette v. Kirkwood*, 45 Mich. 51; *M. & W. P. R. R. Co. v. Moore*, 51 Ala. 394; *Brintnall v. S. & W. R. R. Co.*, 32 Vt. 676; *Wolff v. Central R. R. Co.*, 68 Ga. (45 Am. Rep. 501) 653; *Ellsworth v. Tartt*, 26 Ala. 733; *Ins. Co. v. R. R. Co.*, 104 U. S. 146; *Irvin v. Nashville, etc., R. R. Co.*, 92 Ill. 103; *Little v. A. G. S. R. R. Co.*, 71 Ala. 611; 1 Greenl. on Ev. § 79; *Woodbury v. Frink*, 14 Ill. 279.

RICE & WILEY, *contra*.—The burden of proof was upon appellant to show that said trunk was delivered to the connecting line of railroad in safe and good condition. If goods are delivered to a common carrier, or its agent, and said goods are not delivered to the shipper, this is *prima facie* evidence of negligence, or misconduct.—*Minne v. I. Cen. R. R. Co.*, 31 Iowa, 533; *Levering v. Union Transp. Co.*, 42 Mo. 88; *Hastings v. Pepper*, 11 Pick. 41; *Peck v. Weeks*, 34 Conn. 152;



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*Davidson v. Graham*, 2 Ohio St. 141; *Stokes v. Saltonstall*, 13 Pet. 181; *Whitesides v. Russell*, 8 Watts & Serg. 44; *Van Winkle v. S. C. R. R. Co.*, 38 Ga. 32. In other words, it is sufficient to show the loss or damage done, in order to render the carrier liable; and the burden of proof is then upon the carrier to show that it was occasioned by such cause as will exempt him from liability.—*Ewart v. Street*, 2 Bailey (S. C.), 161; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Hall v. Cheney*, 36 N. H. 27; *King v. Shepherd*, 3 Story, 356; *Chapman v. New Orleans, etc., R. R. Co.*, 21 La. Ann. 224; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340; *Baltimore R. R. Co. v. Morehead*, 5 W. Va. 293; *Agnew v. Steamer Contra Costa*, 27 Cal. 425. The injury to appellee's trunk and loss of his goods having occurred while *en route*, he has no conceivable means of proving in whose hands said trunk and its contents were at the time of said injury and loss. The appellee lost all sight of, and control over the goods when he committed the same to appellant at Union Springs, Ala., a line of connecting carriers, to be carried to Birmingham, Ala., his point of destination. "It is, therefore, perfectly proper to shift the burden of proof on the carrier who is sued."—9 Am. & Eng. R. R. Cases, pp. 94-6, and cases cited in the notes thereto.

CLOPTON, J.—We see no error in overruling the demurrer to the complaint for want of certainty in the description of the property, which it is alleged the defendant failed to deliver. It is described as "one trunk" containing certain articles, and, among others, "*clothing and personal wearing apparel*." The rule as to certainty in pleadings, as observed by Mr. Stephen, "is not so strictly construed, but that it sometimes admits the specification of quality and quantity in a loose and general way." Accordingly, at common law, a declaration in trover for "a library of books" has been deemed good without further description; and so for "two packs of flax and two packs of hemp," without specifying weight or quantity. Stephen on Plead. 298-299. Our own decisions have sustained descriptions equally wanting in details of statement. *Haynes v. Crutchfield*, 7 Ala. 189; *Thompson v. Pearce*, 49 Ala. 210. When specific property is sued for, in an action of detinue, a somewhat stricter rule of description is admitted to prevail.—*David v. David*, 66 Ala. 139.

Where the action is brought on a special contract, it is incumbent on the plaintiff to prove the contract, substantially as alleged. A variance in any material matter of description is fatal to the right of recovery. The complaint sets out an agreement by the defendant alone, to transport the goods of plaintiff to Birmingham, to be there delivered to the plaintiff.

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The contract proved was made with the Mobile and Girard Railroad Company, and is not an agreement by the defendant to transport to Birmingham, but to deliver them to the South and North Alabama Railroad Company. The duty and liability of the defendant under the contract proved are materially variant from its duty and liability under the contract as alleged. Under the complaint, the plaintiff is not entitled to recover on the contract proved.—1 Greenl. on Ev. § 60.

The plaintiff, in April, 1883, procured from the Mobile and Girard Railroad Company through tickets for the transportation of himself and members of his family, and through checks for the transportation of his baggage from Columbus, Georgia, to Birmingham, Alabama, over the respective roads of the Mobile and Girard Railroad Company, of the defendant, and of the South and North Alabama Railroad Company, which were connecting lines, the defendant's being the intermediate road. When the baggage reached Union Springs, the place at which the road of defendant connects with the road of the Mobile and Girard Railroad Company, it was in good condition; but when it was delivered to the plaintiff at Birmingham, one of the trunks had been broken, and the contents abstracted. On these facts, the court instructed the jury, if the trunk was delivered to and received by the defendant in good order, and when it was delivered to the plaintiff at Birmingham it was badly broken, and its contents taken out, it devolved on the defendant to show that it was delivered in good condition to the South and North Alabama Railroad Company, and, if it failed to show this, the plaintiff is entitled to recover. There was no evidence, other than that the trunk was in good order at Union Springs, showing when or where it was damaged, or what was its condition when delivered by the defendant at Montgomery to the South and North Alabama Railroad Company. The instruction presents the direct question: Where baggage, for the transportation of which over three connecting roads, operated by separate and independent companies, through checks have been issued by one of the terminal roads, is found damaged when delivered at the place of destination by the other terminal road, does the burden of proof, in the absence of any special contract or arrangement between the companies, rest on the intermediate road to show not only a delivery to the connecting terminal road, but also that the baggage was *in good condition when so delivered*, it being shown to have been in good order when received by the intermediate road?

While the transportation of baggage, as such, is incidental to the carriage of the owner as a passenger, and while the railroad companies are only responsible to passengers for injuries sustained from some neglect or wrong, they are liable for the

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safe delivery of their baggage in the same manner and to the same extent as carriers of merchandise.—2 Rorer on R. R'ds. 991. The question will, therefore, have to be determined on the same principles, as if the baggage had been shipped as freight over the connecting roads. If the defendant were both the receiving and delivering carrier, or liable for the safe delivery of the baggage at the point of destination, proof that it was in good condition when received, and in a damaged condition when delivered, would cast on the defendant the *onus* of showing that the damage was occasioned by some cause, which excepts from the absolute liability of safe delivery.

An arrangement, express or implied, between companies operating several roads, by which either terminal road can issue through tickets and through checks for baggage, each being entitled only to the fare for transporting over its own line, does not render each one liable for loss or damage sustained on any of the roads.—*Ellsworth v. Tartt*, 26 Ala. 733. Such arrangement is not operative to impose on the intermediate carrier the absolute liability of safe delivery.—*M. & W. P. R. R. Co. v. Moore*, 51 Ala. 394. An arrangement, such as the one shown by the evidence, imposed on the defendant the duty to receive from the terminal road, safely carry over its own road, and deliver to the other connecting terminal road.—*Insurance Co. v. Railroad Co.*, 104 U. S. 146. The receiving terminal road has no power or authority, in the absence of a special contract, to bind the intermediate road to transport beyond its terminus. When the goods have been safely carried to its terminus, its duty as a carrier ceases, and the duty of forwarding arises.

In England, the courts generally have held that the duty and obligation of the carrier, who first receives, continues through the entire route of transportation. In this country there has existed a diversity of opinion. In *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, Mr. Justice Davis, while regretting this diversity of opinion as unfortunate for the interests of commerce, says: "But the rule, that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction." In *Lindley v. Railroad Co.* 88 N. C. 547, it was held that, in the absence of explanation as to how or where the loss or damage occurred, or which of the roads on the route is culpable, the receiving carrier must be held responsible for the injury, and that the non-delivery, or delivery in bad condition by the last of the connecting lines, is *prima facie* evidence of default in the receiving carrier. In *Mobile & Girard R. R. Co. v. Copeland*, 63 Ala. 219, it is said: "It must be regarded as settled, that a carrier, though a corporation, chartered by the laws of a par-



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ticular State, having a known and defined line of transportation, may contract for the safe carriage and delivery of goods to a point beyond the terminus of his line, within or without the State; and if such a contract is made, all connecting lines stand in the relation of his agents, for whose defaults he is responsible to the owner of the goods;" and it was held that, in such case, it was the known and established duty of the carrier to deliver them at that place, and to the person who has the right to receive them. This rule is conceded, where the contract is for delivery beyond the terminus of the line; but the special agreement in this case was, that the receiving carrier would safely transport the baggage to Union Springs and deliver it in good condition to the defendant, the next connecting road. When this was done, the duty and responsibility of the receiving carrier were at an end. In case of a non-delivery at the point of destination, or a total loss, the liability is *prima facie* on the receiving carrier, and casts on him the *onus* of showing a delivery in good condition to the next connecting road. The expressions in *S. & N. R. R. Co. v. Wood*, 71 Ala. 215, if otherwise understood, are explained and modified as here stated. In case of delivery in bad order by the last carrier, the presumption against the first carrier does not arise.

A different rule applies in the case of the discharging or delivering carrier. From the necessities of trade and commerce, or of successful competition, or from other causes, it has become common to establish long routes of transportation by successive and connecting roads. Under such circumstances, it would generally be difficult and oftentimes impossible, for the owner to show on which road they were injured. One of the roads is certainly responsible; and the last carrier has the means of showing the condition of the goods when received by him. The safety and protection of the commercial and traveling public require the recognition of the presumption, in the absence of evidence, that the goods continued in the same condition as when received by the first carrier, unless it may be exceptional goods of a perishable nature, and casts on the discharging carrier, who delivers them in a damaged condition, the burden of showing their condition when received by him. It has been held in some cases that no such presumption arises, but the rule we approve is ably and elaborately considered and sustained in the following cases: *Laughlin v. C. & N. Ry. Co.* 28 Wis. 204; *Smith v. N. Y. Cen. R. R. Co.*, 43 Barb. 225. This presumption harmonizes with the spirit, and promotes the policy of the statute, defining the duty and liability of common carriers in respect to the reception of goods for transportation, and their delivery.—Code of 1876, § 2139.

No case has been cited to our attention, and we have found

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none, which clearly and expressly determines the rules of presumption in an action against the intermediate carrier. The case of *Lindley v. R. R. Co.*, 88 N. C., *supra*, has been mentioned as sustaining the rule, that delivery in bad condition by the last of successive lines is *prima facie* evidence of default in the intermediate line; but an examination of the opinion shows that the defendant, the Richmond and Danville Railroad Company, was managing and operating the road that received the freight, with other connecting roads, under the general name of the Piedmont Air-Line Railway, and was treated and regarded as the first or receiving carrier. There is no question of the liability of an intermediate carrier for a loss or injury occurring on its own road.—*Chi. & R. I. R. R. Co. v. Fahey*, 52 Ill. 81.

Though the intermediate carrier occupies, to some extent, relations different from those of the first and last carriers, the principles applicable to them, and to carriers in general, will serve to elucidate the question we are considering.

When goods are received by a common carrier for transportation, and are lost or damaged while in his custody, the presumption is, that it was occasioned by his default; but the owner must offer some evidence tending to show a non-delivery or delivery in a damaged condition—in other words, some evidence of the loss or injury while in the custody of the carrier. Proof of the mere reception of goods by a carrier and of their condition when received, without more, does not create the presumption of loss or damage.—*S. & N. Ala. R. R. Co. v. Wood*, 71 Ala. *supra*. We have said that the duty of the intermediate carrier is to transport safely the goods to his terminus, and deliver in the same condition in which they were received to the next connecting line. A delivery, in such case, to the next connecting line is tantamount to, and must be governed by the same rules as a delivery to the consignee, where the goods are to be so delivered at the terminus of the line of the intermediate carrier. Had the contract of the defendant been to transport the baggage to Montgomery, the terminus of the road, to be there delivered to the plaintiff, proof of the reception of the baggage, in good order, by the defendant, and a delivery to the plaintiff in apparently like order, though it were subsequently discovered it had been damaged, would not, without more, cast on defendant the burden of showing it was in good condition when delivered. The plaintiff must introduce some evidence of the damaged condition of the goods *at the time of delivery*. On like principles, when the baggage was delivered by the defendant to, and received by the next connecting road, proof that it was in a damaged condition when delivered by the last carrier does not

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operate, in the absence of other evidence, to cast on the intermediate carrier the *onus* of showing that it was in good condition when delivered to the next connecting road.

We have shown that when goods are received in good condition by the first carrier, to be transported by successive and connecting lines, the presumption is, they continue in the same condition until the contrary is made to appear. This presumption is indulged to place a *prima facie* liability on the carrier who delivers the goods in bad order, and who knows their condition when received. To hold that a delivery in bad order by the last carrier raises also the presumption of default in the intermediate carrier, will present the anomaly of two inconsistent legal presumptions—that the same damage was occasioned by the default of the last carrier, and the intermediate carrier, while the goods were in their respective custody at different times.

Were there no evidence of a delivery to the next connecting road by the defendant, who had received the baggage, or evidence that it was in bad order when delivered, the *onus* would be on the defendant to show that the loss or injury was occasioned by some cause which exempted from liability. But it appearing from the evidence that the trunk was delivered by the last carrier to the plaintiff,—thereby making manifest a delivery by the defendant to such carrier,—if the plaintiff would hold the defendant liable for the damage, he must offer some evidence showing the condition of the trunk at the time of delivery by the defendant.

A presumption should be the natural, usual, and probable inference from the facts proved. A duty having been performed, the presumption of deficient performance will not arise from a subsequent event, no direct relation or connection between such event and the act of performance being shown.

It may be said that this rule will operate to force the owner to successive suits against the different carriers. Any rule of presumption may have the same effect. If the instruction of the circuit court were sustained, and the defendant should show the baggage was in good condition when delivered, the plaintiff would be driven to a suit against the last carrier. No rules can be adopted which would avoid such effect, other than to hold each carrier responsible for the damage, without respect to the line on which it occurred, which would violate well settled principles of law. The formation of long routes of transportation by successive roads is in the interest of cheaper transportation, and rapid transit; and if shippers adopt this mode of shipment, they accept its difficulties with its benefits. We have endeavored to formulate the rule applicable to each carrier,



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which best accords with established legal principles—*Darling v. B. & W. R. R. Co.*, 11 Allen, 295.

Reversed and remanded.

## East Tennessee, Virginia and Georgia Railroad Company v. Johnston.

*Action by Shipper against Railroad Company for Recovery of Damages for Injuries to Cattle while in Transit.*

1. *Common carrier's liability for cattle received by it for transportation; extent of.*—Under the rule adopted in this State, when not modified by special contract, a common carrier, undertaking to transport cattle, assumes the full obligations to furnish safe and suitable vehicles, and an adequate road, and to exercise due care and foresight to guard against loss or injury from external sources; but he does not become an insurer, and his liability does not extend to any damage resulting from the nature, disposition, or viciousness of the animals, or from any intrinsic cause, against which care and foresight could not provide.

2. *Same; when special contracts limiting liability upheld.*—Special contracts made by common carriers with shippers of cattle, restricting and avoiding their liability for the unusual risks peculiar to the transportation of such freight, are maintained and upheld by the courts, when the limitations are just and reasonable, and do not exempt the carriers from liability for any loss or injury caused by their own act or negligence.

3. *Same; adequacy and sufficiency of vehicles furnished.*—In respect to the adequacy of carriage, a railroad company meets its duty and obligation, when it furnishes such as is most in use, and is approved by persons skilled and experienced in the business, as necessary and proper for safe transportation, having in view the kind and nature of the freight; and the omission of any part or appliance, permanent or usual in the construction or preparation of a car, and which is necessary and proper to its adequacy for the general uses and purposes of railroad transportation, is *prima facie* negligence; but to charge the company with negligence because of the omission of some peculiar, adventitious and temporary preparation, the necessity or propriety must be shown by extraneous evidence.

4. *Same; omission to "bed" car; effect of.*—When the liability of the railroad company is not modified by contract, and he undertakes the transportation of cattle under the common law liability for safe delivery, it can not be affirmed, as matter of law, that the failure to "bed" a car for the transportation of cattle with straw or other material, is negligence *per se*; but if it is shown that such a course is usual and customary, and is such a precaution as a prudent, competent, and faithful man, experienced in the business, would take, the company will be responsible for any injury caused by its omission in this regard.

5. *Same; special contract construed in respect to bedding car.*—Where a shipper of cattle contracts with a railroad company for the use of a car for the transportation of cattle, having reference to the cars in use on the defendant's road, in the absence of any stipulation for any particular kind of car, the extent of the company's obligation is to fur-

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nish a safe, serviceable and adequate car, adapted to the use intended; and the shipper retaining control and charge of the cattle, and assuming the risk and responsibility of loading, his understanding of the contract may be inferred from the fact, that he had provided material for bedding the car; and the company will not be held liable for any loss or injury arising from his fault or neglect in this regard.

6. *Same; when not liable for failure to bed car.*—Hence, the shipper, having assumed, by special contract, the duty of proper storage of his cattle, and having accepted and loaded the car without objection, and with knowledge that it was not bedded, can not hold the company liable for negligence because of a failure to bed the car, or because of the insufficiency of the bedding. In such case, by his contract he virtually agrees that "in respect of the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence."

7. *Usage as an element of contract; when admissible.*—A usage or custom, to be admissible in explanation of the terms of a contract which are ambiguous or doubtful in signification, must be reasonable, must not contravene or displace any of the general principles of statutory or common law, or vary or contradict the express terms of the contract, and must be brought home to the knowledge of the party sought to be charged, either by proof of actual notice, or by proof of its existence sufficiently long to raise a presumption of knowledge.

8. *Same; when admissible to interpret contract between common carrier and shipper of cattle.*—When a special contract is entered into between a railroad company and the owner of cattle, for the transportation of the cattle, and it is silent as to the kind of car to be furnished, and as to any special preparation of the car, and, while providing that the shipper shall retain control and charge of the cattle, and assume the risk and responsibility of loading, it is also silent as to what special duties were undertaken by him in these particulars, evidence of a usage or custom, by which he is to bed the car, known to him, and upon which he had acted in making previous shipments, is admissible for the purpose of interpreting and explaining the intention, meaning and understanding of the parties in making the special contract.

9. *Special contract for transportation of cattle; when not unreasonable.* There is nothing unreasonable in the provision of a special contract made by a railroad company for the transportation of cattle, by which the owner assumes the duty of loading, transferring and unloading the cattle; and for any injury caused by overloading, or other improper loading, the company, if without fault or negligence on its part, is not liable.

10. *Same; when unreasonable and void.*—But a clause in such contract, exempting the company "from all other damages incidental to railroad or steamboat transportation, which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agents of the said railroad or steamboat companies," relieving, as it seeks to do, the company from all negligence less than gross, is unreasonable, and can not be maintained.

11. *Same; burden of proof when injury shown.*—When there is a contract between a common carrier and shipper, limiting the former's liability, the injury having occurred, the burden of proof is on the carrier to show, not only that the cause of the injury is within the exception, but that the injury did not result from the carrier's negligence.

12. *Duty of railroad company in assigning cars in making up trains.* While, in making up a train, large discretion must be allowed a railroad company in assigning cars to different positions, it is, nevertheless, the duty of the company, having regard to the nature and character of all kinds and classes of freight received by it for transportation, to assign a car loaded with freight of a particular nature such position, so far as may

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be consistent with the safety and interests of other shippers, as will cause the least exposure to danger.

13. *Same.*—Although a railroad company may have, consistently with its duty to other shippers, placed a car loaded with cattle at a greater distance from the engine, yet, if the injury suffered was not caused by the proximity of the cattle to the engine, the company is not liable therefor, in the absence of negligence on its part causing the loss.

14. *Measure of damages for injuries to cattle shipped on railroad; what is.*—The measure of damages for injuries to cattle shipped by railroad, resulting in death, is the market value of the cattle at the place of destination, less the expense of transportation, although such place is beyond the terminus of the company's road, and it was not liable for injury occurring beyond its terminus.

#### APPEAL from Marengo Circuit Court.

Tried before Hon. WM. E. CLARKE.

This was an action by Charles P. Johnston against the East Tennessee, Virginia and Georgia Railroad Company, a corporation controlling and operating a railroad in this State, for the recovery of damages for injuries received by plaintiff's cattle, which had been delivered to the defendant, at Demopolis, Alabama, a place on the line of said road, for transportation, as alleged in the complaint, to New Orleans, Louisiana, and which are alleged to have been injured *in transitu*.

On the trial evidence was introduced by the plaintiff tending to show that, on 12th December, 1883, he delivered to the defendant at Demopolis, for shipment to New Orleans, thirty head of cattle; that six of the cattle were injured in transit from Demopolis to Meridian, Mississippi, the terminus of defendant's road, and from such injuries they afterwards died; that it was "necessary and proper that a car for the transportation of cattle should be bedded, as the absence of bedding caused the floors of cars to become very slippery, and thus rendered stock more liable, than with bedding they would be, to fall down, and made it more difficult for them to stand on their feet;" that a car could be properly and sufficiently bedded with saw-dust, cotton-seed, corn-stalks, or pine-straw, a wagon load being sufficient; that more risk accompanied the shipment of cattle in the absence of such bedding than when cars were furnished with it; that plaintiff had provided a sufficient quantity of saw-dust for the purpose of bedding the car in which the cattle were to be shipped, but was prevented from properly doing so by the position in which the car was placed on defendant's side-track, on arrival of the train, it being some distance from the chute at which cattle had to be put on the cars, and near which he had deposited his saw-dust; that the conductor did not place the car at the chute until a short time before leaving, and declined to wait until all the saw-dust could be put in the car; that the car, being insufficiently bed-



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ded, was placed third from the engine in a train of fourteen cars, although plaintiff insisted that the conductor should place it in the rear of the train, and the place in which it was placed was more dangerous than a position in the train further from the engine; that the cattle were repeatedly down in the car on the way from Demopolis to Meridian, thereby receiving the injuries which caused their death; and that the value of the cattle so injured, at Meridian, was \$151.

The defendant read in evidence a contract executed by it and the plaintiff on the day of shipment, reciting the delivery of the cattle to defendant by plaintiff, consigned to him at New Orleans, to be transported by the defendant "to its freight station at Meridian, ready to be delivered to, and unloaded by the consignee, or upon his order, or to such company or carrier, if the same is to be forwarded beyond said station, whose line may be considered a part of the route to the destination of said stock;" and that it was "distinctly understood that the responsibility of" the defendant "and connecting lines, as common carriers, shall cease at the end of the road, upon" stated conditions, of which those material to the points decided are set out in the opinion. The defendant also introduced evidence tending to show that the car in which the cattle were shipped was placed at Demopolis an entire day before shipment, and the train was delayed about two hours in loading them; that the car was sufficiently bedded, and was placed in or near the middle of the train; that the plaintiff superintended the loading of the cattle, and was told at the time that he was putting too many in the car; that the plaintiff made no complaints during the trip to any of defendant's agents; and that about thirty minutes after the arrival of the train at Meridian, the car containing the cattle was delivered to the connecting line, the cattle being "up and in good condition."

On the cross-examination of the plaintiff, who was examined as a witness in his own behalf, the defendant offered to prove by him, (1) that it was usual and customary for persons, who shipped cattle over defendant's road, to bed cars furnished for transportation of cattle, and that the bedding of such cars had never been required of the defendant; and (2) that the plaintiff had, before said shipment, shipped other cattle over defendant's road, and, in doing so, he had bedded the cars furnished him for that purpose, without objection, and that he had not given defendant notice that, on this occasion, he would require defendant to bed the car. The court separately refused to allow the offered proof to be made; and to these rulings the plaintiff duly excepted.

The bill of exceptions purports to set out all the evidence, the material portions of which are stated above; and on this

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evidence the court charged the jury, *ex mero motu*, as follows: 1. "If the jury believe from the evidence that the cattle were injured on defendant's road, and delivered at Meridian in a damaged condition, it is the duty of the railroad to relieve itself of negligence by proof, and the burden in this respect is on it." 2. "If the jury believe from the evidence that the bedding of a car was necessary and proper for the safe transportation of cattle, then it was the duty of the defendant to bed the car it furnished the plaintiff." 3. "It was the duty of the defendant to see that the stock were not overloaded in said car; and a stipulation in said contract, by which the plaintiff takes the risk of loss from said cause, is unreasonable and void."

The court refused, at the defendant's written request, to give the following, among other charges: (1) "That if the jury believe the evidence, they will find for the defendant." (2) "If the jury believe from all the evidence that the plaintiff suffered loss from the matters complained of in this suit, they can give him no damages, unless they further believe from all the evidence that such loss was occasioned by the negligence of the defendant; and the burden of proof as to negligence is on the plaintiff in this case." (3) In substance, that if the jury should find for the plaintiff, the utmost extent of his recovery would be the difference between the market values of the cattle at Meridian, at the time of their delivery there, in sound condition and in damaged condition; and the burden was on the plaintiff to prove such values. (4) "That under the evidence in this cause, it was not the duty of the defendant to bed the car it furnished the plaintiff for the transportation of his cattle."

The court gave the following charges requested in writing by the plaintiff: 1. "If the jury believe from the evidence that the nearer a car loaded with cattle is put to an engine, the greater the danger to the cattle, and that the train could have been so arranged as to have placed the car in which plaintiff's cattle were loaded at a greater distance from the engine than it was placed, without prejudice to other shippers having the same kind of freight, it was the duty of the defendant so to do; and its failure to do so was negligence; and if the jury further believe that the injury to the cattle was attributable to the nearness of the car to the engine, the defendant is liable for such injury, and the plaintiff is entitled to a verdict." 2. "If the jury believe from the evidence that the cattle were in good order and condition when delivered to defendant at Demopolis, and were injured on defendant's line, between Demopolis and Meridian, the defendant could only discharge itself by showing that defendant and its agents and servants had not been negligent, and had taken that care of the cattle which the nature of the cattle required from the time they were received at De-

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mopolis until they reached Meridian." 3. "If the jury believe from the evidence that the cattle were in good order and condition when received by the defendant, and were injured along the line of the defendant's railroad, the plaintiff is entitled to a verdict, unless the defendant shows that the injury occurred without any negligence or default on the part of its agents or servants." 4. "Negligence is the absence of care and diligence under the particular circumstances of the case; and it is for the jury to say whether, under the circumstances, the railroad company did all that any ordinary person would have done in taking care of the stock; and if, from all the circumstances of the case, they believe that the railroad company, or its agents or servants failed to exercise such due care and diligence, they should find a verdict for the plaintiff."

The defendant pleaded the general issue, and also several special pleas, setting up the contract of shipment, and performance on its part; and upon issues joined on these pleas the cause was tried, the trial resulting in a verdict and judgment for the plaintiff.

To the several rulings in instructing the jury, and in failing to instruct as requested by defendant, above noted, the defendant duly excepted; and he now assigns the same, with the rulings on the evidence, also above noted, as error.

PETTUS & PETTUS and W. H. TAYLOE, for appellant.

TOULMIN, TAYLOR & PRINCE, *contra*.

CLOPTON, J.—The increasing requirements of trade and commerce, the growing populousness of different and widely separated sections of the country, and the necessity for speedy transportation, have constituted the carriage of living animals by railway an extensive and important part of the employment of railroad companies. Since such companies have undertaken the transportation of live stock, their liability as such carriers has been the subject of frequent consideration and adjudication, and the decisions are not in harmony. The rule adopted in this State, when not modified by special contract, is, that "the common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property."—*S. & N. Ala. R. R. Co. v. Henlien*, 52 Ala. 606. Under this rule the carrier, undertaking to transport cattle for those who choose to employ him, assumes the full obligation to furnish safe and suitable vehicles, an adequate road, and to



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exercise due care and foresight to guard against loss or injury from external sources; but does not become an insurer, and his liability does not extend to any damage resulting from the nature, disposition or viciousness of the animal, or from any intrinsic cause, against which care and foresight could not provide.—*Clark v. Ro. & Sy. R. R. Co.*, 14 N. Y. 570; 3 Am. & Eng. R. R. Cas. 489; *Goldey v. Penn. R. R. Co.*, 30 Penn. St. 246; *Welsh v. P., F. W. & C. R. R. Co.*, 10 Ohio St. 73.

To avoid liability for the unusual risks, peculiar to the transportation of such freight, it has become customary for carriers to make special contracts restricting their liability. Such contracts, when the limitations are just and reasonable and do not exempt the carrier from liability for any loss or injury caused by his own act or negligence, are maintained. A special agreement was made between the plaintiff and defendant, by which, in consideration of a reduced price, and a free passage to the owner or his agent on the train with the stock, the owner assumed designated risks, and the defendant was released from any liability for damage resulting therefrom. These limitations, so far as are material in the consideration of the questions presented by the record, are as follows: "Said owner and shipper do hereby assume and release said railroad from all injury, loss and damage, or depreciation, which the animals or either of them may suffer in consequence of either of them being weak, or escaping or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or of being injured by fire or the burning of any material, while in the possession of the company, and from all other damage incidental to railroad or steamboat transportation, which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agents of said railroad or steamboat companies. And it is further agreed, that said owner or shipper is to load, transfer and unload, said stock at his or their own risk. And it is further agreed that, in case of accident to, or delays of time from any cause, the owner and shipper is to feed, water and take proper care of the stock at his own expense." At the foot of the contract is a memorandum, that the plaintiff is in actual charge of the stock.

The contract does not relieve the defendant from the duty to supply safe and suitable vehicles. In respect to the adequacy of carriage, a carrier meets his duty and obligation when he furnishes such as is most in use, and is approved by persons skilled and experienced in the business, as necessary and proper for safe transportation, having in view the kind and nature of the freight. The omission of any part or appliance, permanent or usual in the construction or preparation of a car, and which

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is necessary and proper to its adequacy for the general uses and purposes of railroad transportation, is *prima facie* negligence. But to charge the carrier with negligence, because of the omission of some peculiar, adventitious and temporary preparation, the necessity or propriety must be shown by extraneous evidence. We can not affirm, as matter of law, that the failure to bed with straw or other material a car for the transportation of cattle is negligence *per se*. If, however, it were shown that to bed the car in such cases is usual and customary, and is such a precaution as a prudent, competent and faithful man, experienced in the business, would take, the carrier will be responsible for any injury caused by omission in this regard. This is the rule when the liability of the carrier is not modified by contract, and when he undertakes the transportation of cattle under the common law liability of safe delivery.

The charge given by the court asserts, on the hypothesis stated, that it was the duty of the defendant to bed the car *furnished the plaintiff*. The instruction should be considered in connection with the special agreement. This contract was for the use of a car for the transportation of cattle—a hiring of the car,—having reference to the cars in use on the defendant's road. There was no stipulation for any particular kind of car. The extent of the obligation of the defendant was to furnish a safe, serviceable and adequate car, adapted to the use intended. The plaintiff retained control and charge of the cattle, and assumed the risk and responsibility of loading. His understanding of the contract may be inferred from the fact that he had provided material for bedding the car. The defendant will not be held liable for any loss or injury arising from the fault or neglect of the plaintiff.—*Kimball v. Rut. & Bur. R. R. Co.* 26 Vt. 247.

When the car was delivered to the plaintiff, he knew it was not bedded, and accepted it without objection. He should have been allowed a reasonable opportunity to bed it, if bedding is necessary and proper. But after having assumed, by the special contract, the duty of the proper storage of his cattle, and after having accepted and loaded the car without objection, the plaintiff can not hold the defendant liable for negligence because of the insufficient bedding of the car. "The owner, by entering into the contract, virtually agrees, that in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence."—*New Jer. St. Nav. Co. v. Mer. Bank*, 6 How. 344; *Chi. & N. W. R. R. Co. v. Van Dresar*, 22 Wis. 511; *Har-*

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*ris v. No. In. R. R. Co.*, 20 N. Y. 232; *Shoemaker v. Kingsbury*, 12 Wal. 369.

In this connection may properly be considered the admissibility of the proposed evidence of a usage or custom in respect to bedding cars. Evidence of usage or custom will not be admitted when it contravenes or displaces any of the general principles of statutory or common law, or varies or contradicts the express terms of a contract, verbal or written. It may be regarded as settled, that the extent of the liability of a common carrier may be regulated or modified by a usage of the particular business, unless its effect is to exempt the carrier from responsibility for his own misconduct or negligence. Where there is an express contract, parol evidence of a usage is admissible to explain terms ambiguous or doubtful in signification, or from which to infer the intention, understanding and agreement of the parties, and to incorporate a stipulation or element, wherein the contract is silent; in such case, the usage or custom becomes a part of the contract.—*Barlow v. Lambert*, 28 Ala. 704.

“The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it.”—*Barnard v. Kellogg*, 10 Wall. 383. In *Mont. & Eu. R. R. Co. v. Kolb*, 73 Ala. 396, it was held in respect to delivery of goods for transportation, that “proof of a contract and habitual practice and usage of the carrier to receive the goods when they were deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties, by which the goods, when so deposited, shall be considered as delivered to him without any further notice,” although such usage was contrary to the established regulation of the company.—*Knock v. Rives, Battle & Co.*, 14 Ala. 249.

The usage must be reasonable, and if there is no positive evidence that it is known to one of the parties, it must have been established and acted on generally, and sufficiently long to raise a presumption of its knowledge; but if it is personally known, the period of its duration is immaterial. When its existence is known, it constitutes an element of the contract, and will be considered by the court in adjudicating the rights of the parties.—*Fulton Ins. Co. v. Milner*, 23 Ala. 420; 1 Smith's Lead. Cas. 934. The special agreement between the plaintiff and defendant is silent as to the kind of car to be furnished,



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or as to any special preparation of the car for the transportation of cattle, or as to what special duties were undertaken by the shipper in assuming to load and take charge of the cattle during the carriage. Evidence of a usage or custom, by which the shipper is to bed the car, known to him, and upon which he had acted in making previous shipments, is admissible for the purpose of interpreting and explaining the intention, meaning and understanding of the parties in making the special agreement.

A drover of cattle, presumably, is more acquainted with their habits, tempers, and viciousness, and the proper mode of management, than the agents and servants of the carrier, and has a better understanding of the manner of loading, so as to guard against the risks of improper loading. Care and vigilance are requisite in transporting live animals by a mode of conveyance so opposed to their instincts, and calculated to excite their fears. The safety of the cattle, and the interests of the owner suggest the propriety of his undertaking the duty and burden of loading, transferring, and unloading, and retaining actual charge. There is nothing unreasonable in the provision of the contract, by which the owner assumed to load, transfer and unload. For any injury caused by over, or other improper loading, the defendant is not liable, if without fault or negligence on its part.—*Squire v. N. Y. Central R. R. Co.*, 98 Mass. 239; *Kimball v. Rut. & Burl. R. R. Co.*, 26 Vt. *supra*.

A carrier can not, by contract, relieve himself of the degree of care and diligence exacted by the common law. Any want of such care and diligence is negligence. He can exempt himself only from liability for loss or injury, not caused by his own or his servant's negligence. The clause of the contract exempting the defendant "*from all other damages incidental to railroad or steamboat transportation, which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agents of the said railroad or steamboat companies,*" is unreasonable, and can not be maintained. The exception relieves the defendant of all negligence less than gross. An injury having occurred, the *onus* of proof is on the defendant to show, not only that the cause is within the exception, but that it was without negligence on the part of the defendant.—*S. & N. Ala. R. R. Co. v. Henlien*, 52 Ala. 606; *Steele & Burgess v. Townsend*, 37 Ala. 247.

A carrier owes equal duty to all persons, who choose to employ him to transport freight. He is under no obligation to give one a preference over others. In making up a train, large discretion must necessarily be allowed the company in assigning cars to different positions. It is, nevertheless, the

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duty of the carrier to assign a car, loaded with freight of a particular nature, such position, so far as may be consistent with the safety and interests of other shippers, as will cause the least exposure to danger—not of shippers exclusively of the same kind of freight, but having reference to the nature and character of all kinds and classes of freight being transported. Although the defendant might have, consistently with its duty to other shippers, placed the car at a greater distance from the engine, if the injury was not caused by its proximity thereto, the defendant is not liable for such injury, if there was no negligence on its part causing the loss. There does not appear to be any evidence, on which to predicate the first instruction given at the request of the plaintiff, and for this reason the charge should have been refused; but under our rulings, giving an abstract charge, if it asserts a correct legal proposition, is not a reversible error.

The cattle were consigned to New Orleans. The measure of damages is the market value of the cattle at the place of destination, less the expense of transportation, although the defendant was not liable for any injury occurring beyond the terminus of its road.—*S. & N. Ala. R. R. Co. v. Wood*, 72 Ala. 451.

Reversed and remanded.

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### *Action for Breach of Special Contract.*

1. *County convicts; contract of sub-hiring.*—A hirer of county convicts, under contract with the commissioners court, has no authority to sub-let them to another person; and such contract of sub-hiring, being illegal and void, will not support an action.

APPEAL from Clarke Circuit Court.

Tried before the Hon. WM. E. CLARKE.

This action was brought by A. J. Arrington, against Daniel L. Morgan and others; was commenced on the 13th August, 1881, and was founded on a written contract by which plaintiff hired and sub-let to said Morgan (for whom the other defendants were sureties) the county convicts of Sumter county, whom the plaintiff had hired from the commissioners court of said county. The said contract, a copy of which was set out in the complaint, and which was dated April 26th, 1879, recites that “the said D. L. Morgan hereby hires from the said A. J. Ar-

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rington, for the year 1879, all the convicts whose names are hereto annexed, to-wit," "and all others that may be hereafter sentenced at any of the courts of said county during said year; and the said Morgan does hereby agree to pay the said Arrington \$6.16 each, per month, for said convicts, to be paid as follows;" "and to furnish said convicts with a sufficiency of good and wholesome food, with medicines and medical attention, and a sufficiency of good and comfortable clothing; and is to attend each circuit court to receive said convicts, and to return them to the sheriff of Sumter county, on the 1st day of January, 1880, unless he or she be dead, or otherwise legally discharged." The complaint alleged, in an amended count, that the plaintiff, on the 16th December, 1878, entered into a written contract with the judge of probate and county commissioners of Sumter county, "for the hire of the persons convicted and to be convicted and sentenced to hard labor for the year 1879, and by the terms thereof bound himself, among other things, to deliver at the jail of Sumter county, on the 31st December, 1879, all the convicts he received from said county, except those who died, or whose term of service had expired, or who had been legally discharged;" that this contract was in force and undetermined, and was well known to the defendants, at the time they entered into said contract of re-hiring with plaintiff for said convicts. The breaches assigned in the complaint were, that the defendants had not paid the stipulated hires, and had not delivered the convicts at the termination of the contract, but had suffered some of them to escape, whereby plaintiff was damnified, etc. The defendants demurred to the complaint, and to each count thereof, on the ground that the contract set out was contrary to public policy, illegal and void, and no action would lie for its breach. The court sustained the demurrer, and its judgment thereon is now assigned as error.

D. C. ANDERSON, for appellant, cited *Ware v. Jones*, 61 Ala. 295; 1 Brick. Dig. 386, § 164; 2 Chitty's Contr. 977, 979, 982.

J. Y. KILPATRICK, *contra*, cited *State v. Metcalfe* [*ante* p. 42].

SOMERVILLE, J.—In the case of *The State v. Metcalfe*, decided at the last term [*ante*, p. 42], it was held, that a contract for the hire of county convicts, made with the hirer by the probate judge, without any order or authority of the commissioners court, was illegal, and the agreement of the hirer to pay for the convicts' services was void, as against the public policy. The plaintiff was debarred from recovery, because he required aid from an illegal transaction in order to establish his cause of action.



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In the present case, the plaintiff, Arrington, hired several convicts from the court of county commissioners of Sumter county; and the hiring seems to have been conducted in accordance with the statute regulating the system of hard labor for the county.—Code, 1876, §§ 4465 *et seq.* The plaintiff, thereupon, sub-let these convicts to the defendants, Morgan and others, without any authority of the commissioners court, and required of defendants, as sub-hirers, a written agreement to pay hire at stipulated rates, with other covenants substantially the same as those contained in the bond exacted under the statute from the plaintiff, as original hirer.

The question for decision is, whether the contract sued on is illegal. If so, the case can not be distinguished from that of *The State v. Metcalfe, supra*. We can see no authority in the statute for the hirer of convicts to sub-hire them to others. The only authority given to any one to let such convicts to hire is that conferred on the court of county commissioners, under whose superintendence and control the hard labor system of the several counties is placed, with power to determine in what manner, and on what particular works, the labor shall be performed.—Code, 1876, §§ 4465–69. The hirer is required to give bond, with sureties, to pay the hire agreed on, and to furnish the convict with “a sufficiency of good and wholesome food, with medicine and medical attendance when necessary,” and, in some cases, specified articles of clothing.—Code, §§ 4470–71.

This statute is strictly penal in its nature, being designed to enforce a species of involuntary servitude in the nature of legalized slavery, incurred by the commission of crime. Being in restriction of the citizen's liberty, such a statute can not be enlarged by implication, or extended to cases not obviously within its words and purport. The servitude legalized is that incurred by the act of the commissioners court in letting the convicts to some person, whom they are authorized to select, and who may be selected because of his good standing and peculiar fitness to take custody of the hirelings. The statute nowhere permits, expressly, or by the remotest implication, a sub-hiring to another and distinct person. This would be tantamount to allowing an assignment of the contract of hiring, without permission of the commissioners court. It would not only be contrary to the policy of the law, as tending obviously to results in violation of the purpose and spirit of the whole system of hard labor, but it is unauthorized by the plain words of the statute, and, therefore, prohibited by implication.

The rulings of the court are free from error, and the judgment is affirmed.

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ACCOMPLICE. See CRIMINAL LAW.

ACKNOWLEDGMENT. See FRAUD.

ACTION.

1. *Right of action under executory contract of sale.*—Under a contract for the sale of a designated number of bundles of cotton ties, which were never delivered, separated from the bulk, or set apart for the purchaser, or otherwise distinguished or pointed out as the particular bundles sold, being executory, and not passing any title, legal or equitable, the party contracting to purchase has no cause of action against a subsequent purchaser who had taken possession. *Fry v. Mobile Savings Bank*, 473.

ADVANCES. See CONTRACTS; LANDLORD AND TENANT.

ADVERSE POSSESSION.

1. *Possession of part of tract of land under color of title; effect of.* Where one in possession of land holds under color of title, and there is no antagonistic possession, the actual possession of a part of the premises will be regarded as constructive possession of the whole according to the boundaries contained in the deed or other muniment of title. *Brady v. Huff*, 80.
2. *Possession of land under parol gift; when adverse.*—Possession of land by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, which, if continued without interruption for ten years, is protected by the statute of limitations, and matures into a good title. *Vandiveer v. Stickney*, 225.
3. *Same.*—That such a parol gift conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar is complete, is immaterial; it is evidence of the beginning of an adverse possession by the donee, which can only be repelled by showing a subsequent recognition of the donor's superior title. *Ib.* 225.
4. *Same; when conveyance rendered void by adverse holding.*—A mortgage of the land by the donor to a stranger, during such adverse possession by the donee, is void, although the donee may know that his title is defective, and the mortgagee has no actual notice of the adverse holding. *Ib.* 225.
5. *Adverse possession of land under parol gift; effect of subsequent possession by donor as donee's tenant.*—The fact that the mortgagor was, in such case, in the temporary occupancy of a portion of the land, at the time of the execution of the mortgage, is immaterial, if he entered after the commencement of the donee's adverse possession, and holds as a mere tenant of the latter, fully recognizing his title as landlord and owner; the settled doctrine in this State being, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter. *Ib.* 225.
6. *Adverse possession of land; what necessary to avoid deed executed by*

ADVERSE POSSESSION—*Continued.*

party out of possession.—To avoid a deed to land executed by a party out of possession, on account of the adverse possession of a third party, it is not required that the possession of the latter should have been under a *bona fide* claim of right to the premises, or under the honest belief that his title was good; it is sufficient if he claimed in independent right, adversely. *Bernstein v. Humes*, 241.

7. *Same*; when not extended by constructive possession.—Adverse possession of land, without color of title, is limited to actual occupancy; the rule, that the possession of a part of a tract will be regarded as constructive possession of the whole, not applying to such a case. *Dothard v. Denson*, 482.
8. *Same*; claim of easement confers no right to fee.—The claim of a mere easement, or other right in land less than the entire fee, does not confer any adverse right to the fee; but, to have that effect, under the statute of limitations, "the claim must be of the entire title, exclusive of the title of any other person." *Ib.* 482.

See CHANCERY, 4; TENANTS IN COMMON; EJECTMENT.

## AGENCY.

1. *Suit on telegraph company's contract for delivery of message.*—If an agent, in delivering and paying for a message to be forwarded by a telegraph company, discloses the name of his principal, for whom he is acting, the contract for the transmission and delivery of the message being oral, this makes it the principal's contract, upon which he can, and should sue in his own name. *Daugherty v. Am. Union Tel. Co.*, 168.
2. *When report by agent to principal not hearsay.*—When an exchange of personal property is made by an agent for his principal, the report of the transaction by the former to the latter for ratification is not hearsay, but a part of the *res gestæ*, in a suit involving the title to the property received by the agent in the exchange. *Meyer v. Hearst*, 390.
3. *Proof of; acts and declarations of agent.*—The general rule is, that the fact of agency must be proved, before the acts, declarations or admissions of the agent can be received as evidence against the principal; but, where the fact of the agency rests in parol, or is to be inferred from the conduct of the principal, if there is any evidence tending to show the agency, the acts or declarations of the agent are admissible as evidence, and the jury must determine the question of agency *vel non*. *Martin, Dumee & Co. v. Brown, Shipley & Co.*, 442.
4. *Joint power of attorney; how exercised.*—In private agencies, a joint power of attorney to two or more persons can not be executed by one of them alone; but in its execution all must act jointly. *Loeb & Bro. v. Drakeford*, 464.
5. *Same*; delegation of.—Nor can one of the agents delegate to another authority to act for him in the execution of such power. *Ib.* 464.

See ATTACHMENT BOND, 4.

## AMBIGUITY.

1. *Latent ambiguity in written contract; admissibility of parol proof in explanation of.*—By written contract, S. agreed to saw lumber for H. "at the price of two dollars per thousand feet," without indicating the rule or mode by which the lumber should be measured. At the time the contract was made, there existed two rules or modes of measurement, well known and understood by those en-



### AMBIGUITY—*Continued.*

gaged in the business of sawing lumber, and differing in results; one being to measure the logs before sawing them, and then, by calculation, to ascertain what quantity of lumber they would produce when sawed into inch boards; and the other, to estimate the lumber by actual measurement after sawing. *Held*, that the words, "at the price of two dollars per thousand feet," created a latent ambiguity in the contract, and that, in an action on the contract, parol evidence was admissible to show the rule or mode of measurement, in reference to which the parties contracted. *Smith v. Aiken*, 209.

2. *Contract for sale of land; when aided by parol as to description.* While a contract for the sale of land, described as "sixty acres Comida and Cone bottom, also ten acres hill-side woodland adjoining the Mitchell tract," unaided by extraneous evidence, is void for uncertainty of description, it is competent to show by parol evidence, in aid of the contract, that, in pursuance of its terms, the land intended to be sold was pointed out and designated by the parties, and that the purchaser was placed in possession thereof; and when thus aided, the ambiguity is cured, and the land identified by the acts of the parties. *Meyer Bros. v. Mitchell*, 475.

### AMENDMENTS.

1. *Amendment of bill in equity; office of.*—The office of an amended bill, when it is not employed under the statute for the purpose of introducing supplemental matter, facts occurring after the filing of the original bill, is the curing of defects in the original bill, and not the introduction of new matter, varying substantially the relief prayed, or the right in which it is claimed. *Ward, Adm'r, v. Patton*, 207.
2. *Bill in double aspect; relief in either aspect must be the same.*—While a bill in equity may be framed originally in a double aspect, or in the alternative, or, if not so framed originally, may, by amendment, be converted into a bill of that character, this does not authorize the introduction into the bill as originally filed, or as amended, several inconsistent claims to relief, founded on different states of fact, either of which, if true, would entitle the complainant to relief of a wholly different character; but each alternative must be the foundation for like relief, or for relief of the same character. *Ib.* 207.
3. *When amendment a departure from original bill.*—A bill having been filed by a judgment creditor of F. against P. and others, to redeem lands which had been purchased by P. at sheriff's sale, and afterwards redeemed from him by another judgment creditor of F., it was, by amendments, converted into a bill for the enforcement of a trust concerning the lands, alleged to have arisen from an agreement into which the complainant, P. and the other judgment creditor of F. had entered; and afterwards, by another amendment, all the parties were stricken out except P., and the bill reduced to a demand for the recovery of damages from P., because, by an alienation to a stranger pending the suit, he had incapacitated himself from executing the trust, or performing the agreement. *Held*, that the amendments departed entirely from the case made by the original bill, and that there was no error in the decree of the chancery court sustaining a demurrer thereto. *Ib.* 207.
4. *When amendment to bill in equity properly allowed.*—To an original bill, filed by an assignee of a note given for unpaid balance of the purchase-money for land, for the purpose of enforcing a vendor's lien, alleging that the note was transferred by delivery merely, an

AMENDMENTS—*Continued.*

- amendment, striking out this allegation, and inserting in lieu thereof an averment, that the note was transferred by indorsement, is properly allowed. *Prickett & Maddox v. Sibert, Adm'r, 315.*
5. *Amendment to bill in equity ; relation to commencement of suit.*—The rule is general, in a court of equity, that an original and amended bill is to be regarded simply as an entirety, constituting but one record, the amended bill relating back to the filing of the original bill ; but this doctrine of relation, being a fiction of law intended to promote the administration of justice, is never permitted to operate so as to prejudice the right, or to work injustice. *Adams v. Phillips, Ex'rs, 461.*
  6. *Same.*—If, in the exercise of the right of amendment, new matters or claims are asserted, not within the *lis pendens*, if the amendment is not merely and strictly remedial, curing a defective or imperfect statement of the cause of action in the original bill, or merely modifying or varying its allegations, the matter or claim introduced by the amendment will not be referred to the filing of the original bill, to the prejudice or injury of the parties against whom the amendment is made ; but if the amended bill asserts the same title, seeks the same relief, corrects only an erroneous statement of the cause of action in the original bill, or supplies a defective statement, not introducing any new matter or claim, it relates back to the filing of the original bill. *Ib. 461.*
  7. *Same.*—A demurrer to an original bill, filed to enforce a vendor's lien on land, having been sustained on the ground, that the contract of sale affirmatively appeared to be within the statute of frauds (it resting, according to the averments, in parol merely, and possession under it only being averred), an amendment seeking to avoid the statute of frauds by the additional averment of a contemporaneous part payment of the purchase-money, being strictly remedial of an imperfect statement in the original bill of facts attending the making of the contract, relates back to the filing of the original bill, although the effect of such relation is, to take the complainant's demand without the bar arising from the lapse of time, if computed from the filing of the amendment. *Ib. 461.*
  8. *Amendment of record nunc pro tunc ; evidence in support of.*—On a motion to amend a record *nunc pro tunc*, parol evidence is never admissible ; but the court, in considering such motion, can only look to matters of record, or *quasi* of record, including any entry or order made by or under the authority of the court, in some book belonging to the office, and authorized to be kept by law, or to papers on file in the cause, which may properly be considered as *quasi* records of the court. *Herring v. Cherry, Smith & Co., 376.*
  9. *Same ; when entry of judgment can not be made.*—An amendment of the record *nunc pro tunc*, by entry of a judgment for the plaintiff, can not be made on a paper found in the file, not entitled in the cause, and not marked filed, purporting to be a verdict of the jury "for the plaintiff," and to be signed by the foreman, in the absence of some entry or memorandum on the judge's docket, or other record evidence, that a judgment was rendered in the cause at the term the trial is alleged to have taken place. *Ib. 376.*
  10. *Same ; admissibility of parol evidence.*—In such case, it is not permissible to prove by parol evidence, that there was a trial of the cause before a jury, and that the paper purporting to be a verdict was in fact the verdict returned by the jury. *Ib. 376.*
  11. When amendment of writ and bond in an attachment suit free from error, see *Mohr v. Chaffe Bros. & Co., 387.*

See CHANCERY, 11 ; CRIMINAL LAW.

APPEAL. See ERROR AND APPEAL.

ASSIGNMENT.

1. *Assignment of debt in equity ; what operates as.*—In a court of equity, an assignment of a debt may be in writing or by parol, and no particular form therefor is essential; it is sufficient if there is an intentional transfer or making over of the subject-matter, conferring a complete and present right on the assignee. *Lowery v. Peterson, 109.*

ATTACHMENT.

1. *Attachment against partnership by firm name ; on what property leviable.*—An attachment against a partnership by its firm or common name, without mention of the names of the individual partners, can only be levied on partnership property; it can not be levied on the individual property of the partners. *Watts v. Rice & Wilson, 289*
2. *Attachment issued for cause not authorized by statute ; remedy for.* When an attachment is sued out for a cause of action upon which the statutes do not authorize its issue, the irregularity can not be reached by a plea in abatement, or by a motion to quash; but the appropriate method of reaching such irregularity is a rule upon the plaintiff to show cause against the dissolution of the writ and its levy; and the motion for the rule must precede a plea to the merits. *Drakford v. Turk, 339.*
3. *Lien of landlord on crops grown on rented lands ; when does not exist in favor of mortgagee of landlord.*—A mortgagee, giving notice to the tenant of the mortgagor, that he claims the rent falling due in the future, does not become, by virtue of the notice, entitled to the statutory lien on the crops grown on the rented premises for the payment of the rent; nor can he enforce the lien by attachment. *Ib. 339.*
4. *Motion to dismiss and strike from docket in attachment suit ; when not revisable on appeal.*—Motions made in the City Court of Montgomery, in an attachment suit on the docket of that court, to strike the cause from the docket and dismiss, on the ground that it appears from the bond and writ, that the attachment is returnable to, and the cause triable in the Circuit Court of Montgomery county, are but the equivalent of a motion to quash the attachment because of defects or irregularities in the affidavit, bond and writ; and, being addressed to the sound discretion of the primary court, the action of the court in overruling them can not be reviewed on appeal. *Mohr v. Chaffe Bros. & Co., 387.*
5. *Bond and writ in attachment ; amendment of.*—A ruling of the primary court, in such case, allowing the writ to be amended, and a new bond to be executed, so as to make it appear that the attachment was returnable to the city court, is, under the statute, free from error. *Ib. 387.*
6. *When plea in abatement defective.*—A plea in abatement in an attachment suit, which craves oyer of the affidavit, bond and writ, and sets them out, but fails to specify or point out any defect or irregularity in either, is fatally defective on demurrer. *Ib. 387.*

See ATTACHMENT BOND ; CHANCERY, 31-35 ; TRIAL OF RIGHT OF PROPERTY.

ATTACHMENT BOND.

1. *Vexation alone no ground of recovery on.*—Vexation without wrong gives no right of action; and hence, in a suit on an attachment



ATTACHMENT BOND—*Continued.*

- bond, no recovery can be had unless the attachment was wrongful. *Jackson v. Smith*, 97.
2. *Liability on, when attachment wrongful.*—If, when an attachment is sued out, no statutory ground for it exists, it is wrongful, no matter how honestly or sincerely the plaintiff may have acted in suing it out; and for such wrongful act, although done by an agent without express direction, the principal and sureties on the attachment bond are liable. *Ib.* 97.
  3. *Damages as affected by probable cause ; when malice inferred.*—When an attachment is sued out by one having probable cause for believing the facts exist which, if true, would authorize an attachment, only actual damages can be recovered, although in fact no ground existed; but if, in such case, there is no sufficient evidence of probable cause, the jury may infer malice or vexation from the absence of such proof, and vindictive or exemplary damages may be recovered. *Ib.* 97.
  4. *Exemplary damages not recoverable on unauthorized malice of agent.* A principal is not responsible for the malice, vexation or wantonness of his agent in suing out an attachment, unless he authorized or participated in it; and such authority or participation, to render the principal liable, must be proved; it can not be inferred from the mere relation of principal and agent. *Ib.* 97.
  5. *When evidence of agent's malice admissible.*—In a suit on an attachment bond, whether against the principal or surety, the unauthorized malice or vexation of the agent not being a ground of recovery, evidence of it should not be allowed to go to the jury. *Ib.* 97.
  6. *Measure of actual damages.*—Damages, to be recoverable in an action on an attachment bond, must be the natural and proximate result of the wrongful, or wrongful and vexatious suing out of the attachment; they must not be the accidental, contingent, or speculative consequence resulting therefrom. *Ib.* 97.
  7. *What evidence admissible.*—In an action on an attachment bond, it is not competent for the plaintiff to testify that the effect of the attachment on him was to prevent him from making a crop, and from doing any business, and that it ruined him; or to prove that he was a man of limited means. *Ib.* 97.
  8. *Same.*—It was further held that the primary court erred in allowing proof to be made in this case by the plaintiff, (1) when and how he obtained money which he placed on deposit with his surety on a replevy bond executed by him in the attachment suit, the fact of such deposit not having been proved against him; (2) how he had lived after the attachment was levied, it not being in rebuttal to any thing proved against him; and (3) that the plaintiff said to witnesses that he was not going to Texas, when it is not shown to have been a part of the *res gestæ*. *Ib.* 97.
  9. *Attachment against partnership ; extent of recovery on bond.*—In a suit on a bond executed for the purpose of suing out an attachment against a partnership by its firm name, payable to the partnership by its firm name, and conditioned, in the event of a failure to prosecute the attachment to effect, to pay the defendants, as partners, "all such damages as they might sustain from the wrongful or vexatious suing out of such attachment," no recovery can properly be had for any damage sustained by one of the partners, by reason of a wrongful levy of the attachment on his individual property. *Watts v. Rice & Wilson*, 289.
  10. *Same ; suit on bond ; what admissible as evidence of malice.*—In such case, however, it is competent to prove such levy, and attendant circumstances of aggravation, wantonness or gross negli-

ATTACHMENT BOND—*Continued.*

gence, for the purpose of proving that legal malice which authorizes the recovery of exemplary damages. *Ib.* 289.

11. *Same*; *res adjudicata*.—In a suit on a bond, executed for the purpose of obtaining an attachment against a partnership by its firm name, and conditioned, on failure to prosecute the suit to effect, to pay the defendants, as partners, "all such damages as they might sustain from the wrongful or vexatious suing out of such attachment," evidence was introduced showing that the individual property of one of the partners, of the value of more than three times the amount of the debt claimed in the attachment, and more than the penalty of the bond, was levied on under the writ; it not appearing for what purpose the evidence was introduced, or that its admissibility was sought to be limited, or that the value of the property actually entered into the verdict of the jury as an element of damage, otherwise than as may be implied by presumption of law from the facts in evidence. *Held*,
  - (a) That the recovery of the value of such property, or the liability of the defendants for it, was not one of the issues actually decided, or necessarily involved in the suit on the attachment bond, and it was not, for this reason, *res adjudicata* between the parties.
  - (b) That a judgment in favor of the plaintiffs in the suit on the bond for the full penalty, though paid, does not estop the partner whose property was levied on from claiming it, in the attachment suit, as exempt. *Ib.* 289.

## ATTORNEY AND CLIENT.

1. *Attorney-at-law*; *power of court to compel payment of money into court*.—When a practicing attorney receives, as such, money or any thing else of value, by virtue of an order of court, made in a case in which he is counsel, and, before he has turned the same over to his client, it is ascertained and decreed that the order has been unadvisedly and erroneously granted, it is in the power of the court to order its restoration to its former custody, and to enforce obedience to such order; and, in such case, the presumed presence of the attorney in court renders it unnecessary to show actual notice prior to the primary order of restoration. *Pinkard v. Allen's Adm'r*, 73.
2. *Same*. If, however, compulsory measures are invoked against the attorney, there should be notice, and an opportunity to show cause should be allowed him. *Ib.* 73.
3. When attorney's authority to execute contract can not be questioned by strangers, see *Price, Ex'rx, v. Carney*, 546.
4. *Notice to attorney notice to client*.—Notice to an attorney, while in the employment and service of his client, of facts connected with the business in which he is engaged, operates as notice to the client. *Ib.* 546.

See CHAMPERTY.

## BANKRUPTCY.

1. *Sale by assignee in bankruptcy under bankrupt law of 1867*; *authority to make*.—The authority of an assignee in bankruptcy to sell the property of the bankrupt under the bankrupt law of 1867, may be reduced substantially to two methods: First, a sale without an order of court, in which case the assignee sells simply the unascertained interest of the bankrupt, leaving to the purchaser the right and duty of settling and determining all controversies as to disputed ownership, and all litigation that may grow out of

BANKRUPTCY—*Continued.*

such disputed ownership; and second, a sale of the entire property, and the entire title to it, freed from all conflicting claims and liens, under section 5063 of the U. S. Rev. Statutes, thereby placing and leaving its proceeds in its stead, as the subject of contention and litigation; and between these two methods there is no middle ground, to which the assignee is authorized to resort. *Tenn. & Coosa R. R. Co. v. East Ala. Ry. Co.*, 516.

2. *Same; when sale does not conform to § 5063 Rev. Statutes; limitation under § 5057 of Rev. Statutes.*—Where, on the petition of an assignee in bankruptcy, a decree is made in the bankrupt court recognizing and establishing the priority of the lien of a creditor who is alone made a party to the petition, and directing a sale of the bankrupt's property subject to the lien, but freed from all other liens, a sale made under such decree does not conform to the provisions of section 5063 of the U. S. Rev. Statutes; and a claimant of part of the property sold, who was not made a party to the petition, and who had no notice of the proceedings, is not barred under the provisions of section 5057 of the Rev. Statutes, because he did not, within two years, prefer his claim in the bankrupt court. *Ib.* 516.
3. *Property of bankrupt; interest of assignee in.*—Where the property of a bankrupt has not been conveyed in fraud of his creditors, the assignee in bankruptcy takes no greater interest in, or better title to it, than the bankrupt himself had. *Ib.* 516.
4. *Possession of vendee under executory contract of purchase; when an estoppel.*—Where a party goes into possession of real estate under an executory contract of purchase, he is estopped from disputing his vendor's title; and, on his being declared a bankrupt, his assignee, standing in his shoes, is equally estopped.
5. *Bankruptcy; limitation of two years under § 5057 Rev. Statutes.* Section 5057 of the Rev. Statutes applies the two years bar to suits "touching property or rights of property transferable to, or vested in the assignee," and extends no further; and hence, where the bankrupt had no property or right of property in the subject of litigation, it neither vesting in nor being transferable to the assignee, the provisions of the statute do not apply. *Ib.* 516.

## BILL OF EXCEPTIONS.

1. *Probate court; term of.*—While a term of the probate court may be kept open from day to day, even after the active business of the term has been disposed of, for the purpose of signing a bill of exceptions, the power of the court to keep the term open can not, in the nature of things, extend beyond the next regular term. *Blake v. Harlan*, 205.
2. *Motion to establish bill of exceptions; when refused.*—Where a bill of exceptions in a contested will case in the probate court, as prepared and presented to the presiding judge in term time, was faulty and inaccurate, not truly stating the point, charge or decision, wherein the court was supposed to have erred, with such a statement of the facts as was necessary to make it intelligible, and its errors were not corrected until after the expiration of the term of the court at which the trial was had,—*held*, on motion in this court to establish the bill, there being no consent or agreement of counsel in writing, that it should be signed in vacation, that the moveants failed to make a case which authorized this court to establish the bill. *Ib.* 205.



## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Protest of bill of exchange ; contents and sufficiency of notary's certificate.*—A statement in the notary's certificate of protest of the names of the parties to whom notice of protest was sent by him, is made by statute competent evidence of the facts stated (Code, § 1336) ; but such statement is not an essential part of the protest, and the fact of notice may be proved otherwise. *Martin, Dumee & Co. v. Brown, Shipley & Co.*, 442.
2. *Relevancy of evidence as to price and quality of cotton shipped to Liverpool, in action between parties to bill of exchange drawn against shipment, and protested for non-acceptance.*—In an action by the indorsee and purchaser, against the drawer and payee of a foreign bill of exchange, which was drawn against a consignment of cotton shipped from Mobile to Liverpool, and was protested for non-acceptance, evidence as to the quality of the cotton is irrelevant and inadmissible, in the absence of evidence showing that it was sold by plaintiffs in Liverpool as of a quality inferior to that at which it was purchased in Mobile ; and if the plaintiffs can be held liable, in such action, for any loss resulting to defendant from their unreasonable delay in selling the cotton in Liverpool after the protest of the bill for non-acceptance, some evidence of such delay and consequent loss must be adduced, before evidence as to the market price of cotton in Liverpool when the cotton arrived there is relevant and admissible. *Ib.* 442.
3. *Notice of dishonor of bill.*—Notice of the dishonor of a bill of exchange, foreign or domestic, though generally given in writing, may be given verbally. *Ib.* 442.

## CERTIORARI.

1. *Common law writ of certiorari ; its functions and office.*—The functions of the common-law writ of *certiorari* extend alike to questions touching the jurisdiction of the subordinate tribunal, and the regularity of its proceedings ; and by it errors of law, apparent on the face of the record, may be corrected, but, in the absence of statutory authority, conclusions of fact can not be reviewed. *McAllilley v. Horton*, 491.
2. *Same ; tried on the record.*—In such case, the trial is not *de novo*, but on the record ; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review. *Ib.* 491.

## CHAMPERTY.

1. *When contract between attorneys and clients not tainted with.*—A contract between parties to two litigated attachment suits and their attorneys is not champertous, which, settling and adjusting all matters of controversy between the parties to the suits, provides that judgments should be rendered for one-half of the proceeds of property which had been levied on and sold under the attachments, and then in the hands of the sheriff ; that designated parts of the fund, when collected, should be paid to the plaintiffs, and the balance divided, in stated proportion, between the attorneys of the parties, plaintiff and defendant, as compensation to them for services rendered in the suits and other controversies between the parties, and to be rendered in the prosecution of suits for the recovery of the fund from the sheriff, or his sureties ; and that one of the attorneys should have the control of the judgments, and of the fund to be realized from the sheriff, or his sureties, until the agreement has been fully executed. *Price, Ex'rx, v. Carney*, 546.

## CHANCERY.

## I. JURISDICTION AND GENERAL PRINCIPLES.

1. *Antenuptial contract construed; when express trust in land created by.* A testator, having devised a tract of land to his widow and grandchild, share and share alike, further provided that, in the event the child died before her marriage or maturity, the whole tract should belong to the widow. After the testator's death, the widow, contemplating a second marriage, entered into an antenuptial contract, whereby it was agreed that, in the event she should become entitled to the child's share in the land, the same should "enure and belong to" the intended husband, and thereafter they should "hold and own the land jointly and equally." After the second marriage was consummated, the child, while an infant of tender years, died. *Held*, that by the contract an express trust was, in effect, declared on the part of the widow, that she would stand seized of the legal title to the use of her intended husband, which became operative upon the death of the child. *Holt v. Wilson*, 58.
2. *What a recognition of the trust as continuing; when not a stale demand.*—The trust having become operative on the death of the child, in May, 1862, and the widow and the husband having held and occupied the lands, as equal tenants in common, from the time of their marriage, in 1861, to the death of the husband, in 1865, it was further held, on a bill filed by the heir of the husband, in January, 1883, against parties claiming adversely to him through the widow, for an enforcement of the trust, that the husband having entered under the provisions of the marriage contract, his possession must in equity be referable to it, and the continuance of such possession must be regarded as evidence of a recognition of the trust as existing, continuing, and undischarged; and that, the bill having been filed within twenty years from the death of the ancestor, no presumption of a settlement or discharge of the trust can arise from lapse of time, although the trust may have been repudiated immediately after his death. *Ib.* 58.
3. *Same; statute of limitations.*—The bill also alleging that the land was held and occupied by the widow, after the death of complainant's ancestor, until her death, in May, 1873, and negating an open disavowal of the trust by her, brought home to the complainant's knowledge, and any outward and unequivocal act done by her, amounting to an ouster, and also negating every inference of an adverse possession until the year 1877, it was further held that complainant's demand was not barred by the statute of limitations of ten years. *Ib.* 58.
4. *Same.*—An adverse possession did not originate in favor of the widow, in such case, merely from the fact that, after her second husband's death, she clandestinely and fraudulently destroyed the marriage contract creating the trust in the land. *Ib.* 58.
5. *Deed to husband and wife; how they take under the rule at common law.*—While at common law husband and wife do not take, under a deed to land executed directly to them during coverture, by moieties, as tenants in common take, but by entireties, with the right of survivorship, this rule does not apply to a conveyance executed prior to their marriage; and hence, it has no application to the facts of this case, the marriage contract, creating the rights of the parties, having been executed prior to the marriage, although the actual title of the husband vested afterwards, under the terms of the contract. *Ib.* 58.
6. *Fraudulent concealment of cause of action; § 3242 of Code construed.* The fact that the widow, after the death of the complainant's ancestor, administered on his estate, destroyed the marriage con-

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tract, which was not recorded, and the existence of which was unknown to the complainant, and failed to disclose its existence to the complainant while she was acting as administratrix, or to her successor, upon her resignation of the trust, is such a fraudulent concealment of complainant's cause of action as brings the case within the influence of the statute giving a party, seeking relief on the ground of fraud, where the statute has created a bar, one year within which to prosecute his suit after the discovery of the facts constituting the fraud (Code, 1876, § 3242). *Ib.* 58.

7. *Same; discovery of; when complainant not guilty of laches.*—The complainant having been only thirteen years of age when his father died, in 1865, and not residing in his father's family, but in another State, and having received, during the widow's administration, or soon after her resignation, trustworthy information, that his father's estate was insolvent; and that there was no distributive share coming to him, and having been, for the first time, apprised of the existence of the antenuptial contract during a visit to this State a few months before filing his bill, in 1883, *it was further held*, that these facts sufficiently negative any laches on the part of the complainant, which might otherwise be inferred from his delay in seeking relief. *Ib.* 58.
8. *When bill not multifarious.*—The lands having been sold in separate lots, under a decree of the probate court, as belonging to the widow's estate, by her administrator, to different persons, the several purchasers may be joined as defendants to a bill seeking to enforce the trust. *Ib.* 58.
9. *Extent of remedy by court of equity, when jurisdiction once acquired.* When a court of equity has acquired jurisdiction of the primary purposes and objects of a suit, it will settle the litigation, although it may involve the adjudication of mere legal questions, without remitting the parties to a court of law for the adjustment of legal rights which are consequential or incidental. *Price, Ex'x, v. Carney, 546.*
10. *Settlement by guardian with ward; when suit to set aside not barred by undue delay.*—On a settlement by a guardian with his ward, which was agreed on, reduced to writing and signed when the latter was eighteen years of age, the ward agreed to accept, in full discharge of the guardian's liability to him, certain real and personal property, the value of which did not exceed half of the amount of the guardian's liability; and about a year thereafter, the ward having been relieved of the disabilities of nonage, the guardian and his wife, in consummation of the settlement, executed to the ward a conveyance, and the ward, acting without advice of counsel, and not being advised by the guardian to seek such advice, received possession of the property, and executed to the guardian a release. The real estate, which constituted the bulk of the property forming the consideration of the release, belonged to the wife, as her statutory separate estate; and of this fact the ward had knowledge at the time the conveyance was executed, but he did not know that, as to the real estate, the conveyance, being of the statutory separate estate of the wife in payment of her husband's debt, was void. *Held*, on a bill by the ward to vacate and set aside the settlement and release, and for an account, filed more than five years after the execution of the conveyance (during which time he continued in possession of the property, using and enjoying the same as his own), but without delay after having been advised by counsel of the legal effect of the conveyance, that the conclusive presumption, that all men know the law, does not apply; that the ward's ignorance of the effect of the conveyance was a complete answer to the objection



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of undue delay in the assertion of his rights; and that he was entitled to relief. *Voltz v. Voltz*, 555.

11. *Amendment of bill in equity; demurrer to original bill not visited on.* The bill, as originally filed, failing to offer to surrender the deed executed by the guardian and his wife for cancellation, etc., a demurrer was interposed on this ground, when the bill was amended by adding to one of the sections the words, "And complainant hereby offers to do in the premises whatever the court shall direct;" but to the bill as amended no demurrer was filed. *Held*, that while on demurrer the bill as amended was scarcely sufficient, yet, the defect being amendable, the demurrer to the original bill could not, on appeal, be visited on the amendment, but that, to enable the complainant to take advantage of the defect, he must show by the record that he invoked the judgment of the primary court, by demurrer, upon the sufficiency of the amendment. *Ib.* 555.
12. *Decree relieving married woman of disabilities of coverture; when void.* A decree relieving a married woman of the disabilities of coverture, based on a petition which fails to aver that she owned any separate estate, is *coram non jndice* and void; and hence, a deed executed by the guardian's wife after having obtained such a decree, conveying to the ward the lands covered by the first deed, is also void. *Ib.* 555.
13. *Conveyance of land, the wife's statutory estate, in payment of husband's debt; when not affected by subsequent conveyance by him to her of other lands.*—The fact that a short time before the commencement of the suit, the husband conveyed to his wife another and more valuable tract of land, in performance of a verbal contract made by him with her at the time of the execution of the conveyance and release, does not render the ward's title good, nor bind him to accept a title requiring litigation, delay and expense to render it indefeasible, even if a court of equity would approve and confirm the conveyance; nor does the conveyance derive any support from the antecedent verbal contract to convey. *Ib.* 555.
14. *Decree setting aside settlement between guardian and ward; effect of failure to order restitution of property and cancellation of deed received by ward.*—On appeal from a decree rendered in such case, setting aside, vacating and annulling the settlement made by the guardian with his ward, and ordering another and final settlement, the failure to require a surrender of the property received by the ward, and a cancellation of the deed executed to him, can not be the subject of assigned error, though such surrender and cancellation are necessary to a complete determination of the cause; they being mere details in the execution of the decree, not pertaining to the equity of the bill, as to which the decree is interlocutory, though final in the sense that it will support an appeal. *Ib.* 555.
15. *Same; when direction as to taking account will not be considered on appeal from.*—Nor on appeal from such decree is it subject of assigned error, that the chancellor instructed the register, in stating the account against the guardian, to charge him with the balance ascertained against him on his last partial settlement in the probate court, allowing him credits for proper and legal expenditures made by him for his ward between the time of such annual settlement and the settlement sought to be set aside. If either party desires to go behind the partial settlement, this is a question of fuller instructions to the register, to which he is entitled on petition or motion therefor. *Ib.* 555.
16. *Same; effect, on appeal, of failure to charge ward with rents.*—While the ward is chargeable with the rents of the land while in his possession, with interest from the end of each year, subject to abate-

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- ment for taxes paid, and for permanent improvements, if any remain which were placed thereon by him, yet, pertaining as they do to the execution of the decree, as to which it is also interlocutory, the failure to instruct the register to charge the ward with such rents, in stating the account against the guardian, is not, on appeal from the decree, ground for reversal. *Ib.* 555.
17. *Same; ward chargeable with rents as payments.*—The husband being estopped, in such case, by his conduct and conveyance, from recovering the rents by any active measure of relief, and the wife not being able, by reason of such estoppel, to recover in his right, the rents will be treated as if they had been realized and then paid by the guardian in part liquidation of his indebtedness to his ward. *Ib.* 555.
  18. *Person non compos mentis; right to sue by next friend.*—A person, *non compos mentis* may sue by next friend, before and without an inquisition of lunacy; but a mere volunteer who institutes a suit as next friend of a *con compos*, before there has been an inquisition of lunacy, always proceeds at his peril; peril, that the alleged *non compos* may not in fact be so, or may recover and repudiate his interference; or that the chancery court may not consider him a suitable person, and may disallow his intermeddling. *Whetstone v. Whetstone's Ex'rs*, 495.
  19. *Same; statute 17 Edward II.*—The statute of 17 Edward II, Ch. 10 and 19, conferring on the king, as *parens patriæ*, power to take care of the property of lunatics and idiots, though enacted before the settlement, or even the discovery, of this country, being inconsistent with our institutions and form of government, is not of force with us. *Ib.* 495.
  20. *Same; equity of bill in equity by next friend; how determined.*—The equity of a bill filed by a *non compos mentis*, suing by a next friend, before and without an inquisition of lunacy, must be determined on its averments, independent of the state of the complainant's mind, and as if she were of sane mind, suing by herself, and in her own right. *Ib.* 495.
  21. *Same; jurisdiction of court of equity to enforce settlement by agent or trustee.*—Where a brother voluntarily assumed the relation of agent and trustee for his sister, a *non compos mentis*, without an inquisition of lunacy, and continued in the management of her estate, receiving the rents, income and profits, and paying her personal expenses, a court of equity, upon his death, will entertain a bill against his executor, in favor of the sister, she suing by next friend, to compel a settlement of the trust. *Ib.* 495.
  22. *Same; control of court over next friend.*—When a bill is filed by a next friend for a *non compos mentis*, who has not been so adjudged, the welfare and interest of the *non compos*, being matters of prime, dominating importance, should receive the careful consideration of the court, before the litigation is allowed to progress. These preliminary inquiries should be first instituted, and, to this end, the chancellor may require the verdict of a jury, or a report from the register, so as to properly inform his conscience; and if the suit is successful, its proceeds should not be allowed to pass into unsafe hands. *Ib.* 495.
  23. *Same.*—Should there be a successful inquisition, and a guardian should be appointed, pending the litigation, an inquiry should be instituted whether such appointment is in the interest of the *non compos*; and if this inquiry prove satisfactory, such guardian should be allowed to control the litigation. *Ib.* 495.
  24. *Continuing trust; when time does not run against.*—When there is a continuing trust, with active duties required of, and performed by the trustee, the case is analogous to a running, mutual account,

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and time does not run against it; but each act done under, or in recognition of the trust, is a renewal of the obligation it imposes. *Ib.* 495.

25. *Partition of lands; jurisdiction of court of equity, when title legal and possession adverse.*—A court of equity will take jurisdiction to decree partition of lands, the title to which is strictly legal, and of which the complainant has not possession, actual or constructive, but which are held or claimed adversely to him. *McMath v. DeBardelaben*, 68.
26. *Same.*—When the title is purely legal, the intervention of a court of equity to decree partition of lands is not matter of judicial discretion, but, if the title is admitted, or is clear, is matter of right in the party invoking it; nor is the jurisdiction in such case dependent upon the existence of particular facts or circumstances, rendering inadequate the legal remedy, but is concurrent with that of courts of law; and until the jurisdiction of these courts has been put into exercise, the court will intervene, though no special cause of intervention may be shown. *Ib.* 68.
27. *Same.*—Prior to the statute (Code, 1876, § 3893), if the title was purely legal, the fact that it was disputed did not oust or exclude the jurisdiction of a court of equity to decree partition of lands, but was merely a cause for directing that the issues of fact should be determined in a court of law, and that proceedings should be stayed until they were determined; and under the statute, by its express provisions, such issues may, if the chancellor so directs, be tried as other issues out of chancery. *Ib.* 68.
28. *Same.*—The statute treats a suit in equity for partition, though the title be legal, as essentially an adversary suit, and contemplates that all questions arising in its progress shall be within the jurisdiction of the court, and subject to its determination; the mere circumstance of an adverse possession, if the complainant has an immediate right of entry, will not prevent the jurisdiction of the court from attaching; and the fact that such adverse possession appears upon the face of the bill, is not material. *Ib.* 68.
29. *Distribution among creditors of fund realized from sale of debtor's property; when erroneous.*—When a fund realized from the sale of a railroad, made under a decree in equity foreclosing a mortgage executed to secure certain bondholders of the railroad company, being insufficient to pay off the secured bonds in full, was ordered to be distributed *pro rata* among such of the bondholders as had come in and proved their claims, and after some, and before others of such bondholders had received from the register their *pro rata* share of the funds, other bondholders of the same class were allowed to come in by petition, prove their claims, and participate in the undistributed residuum of the funds,—*held*, that this was manifestly unequal, unjust and erroneous; that the only way by which the petitioning bondholders could be brought in, and enabled to share in the fund, would be to recast the whole account and declare a diminished dividend, requiring each creditor who had been settled with, to refund *pro rata* to the register; and that this could not be accomplished by petition. *Pinkard v. Allen's Adm'r*, 73.
30. *Same; power of court to vacate interlocutory decree.*—The decree allowing the petitioning bondholders to come in, and participate in the undistributed residuum of the fund was interlocutory, and could be subsequently altered, modified or vacated; and the decree having been made in vacation, without notice to, and without the consent of parties in adverse interest, and being improper in itself, the court, in subsequently vacating it, did not err, but only



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did what should have been done, with or without motion therefor. *Ib.* 73.

31. *Marshaling securities; right of attaching creditor to compel prior execution creditor to exhaust collaterals, before resorting to funds in the sheriff's hands.*—A judgment creditor, with an execution levied on personal property of value sufficient to satisfy his judgment, having received from his debtor, as collateral security, certain choses in action, which were collected by him before sale by the sheriff of the property on which the execution was levied, will be compelled by a court of equity, on a bill filed for that purpose by an attaching creditor, whose attachment was subsequently levied on the same property, and who has reduced his demand to judgment, to apply the money realized from the collaterals in satisfaction of his execution, thereby exonerating the proceeds of the sale of the property levied on, to that extent, from liability to the execution, for the benefit of the attaching creditor, and for the satisfaction of his junior lien. *Gusdorf & Co. v. Ikelheimer & Co.*, 148.
32. *Same; collection realized from collaterals a payment pro tanto of judgment.*—The sum realized by collection from the collaterals, in such case, having been collected before satisfaction was obtained through the medium of the execution, was immediately applied, by operation of law, to the satisfaction of the judgment, to enforce which the execution was issued, extinguishing it *pro tanto*. *Ib.* 148.
33. *Same; right of attaching creditor not affected by subsequent agreement between judgment creditor and debtor.*—An agreement between the plaintiff and defendant in execution, made after the attachment was levied, and notice thereof had been given to them, to the effect that the money realized from the collaterals should only be applied to the payment of any balance of the judgment remaining unsatisfied by the sale under execution, can not impair or affect the right of the attaching creditor to have the two funds thus marshaled for his benefit. *Ib.* 148.
34. *Same; fund realized from the collaterals can not be garnished in hands of judgment creditor.*—The money realized from the collaterals having been immediately applied, by operation of law, to the satisfaction of the judgment of the creditor holding them, other creditors can not, by garnishments subsequently served on him, intercept the money, or prevent the first attaching creditor from enforcing its application to the satisfaction of the execution. *Ib.* 148.
35. *Same; jurisdiction of court of equity not affected by summary remedy in court of law.*—The summary jurisdiction which the court of law may exercise over the sheriff and the parties to the execution and attachment issuing from it, in determining between the rival claimants the priorities of their legal liens, and in controlling and compelling the proper application of the money collected, if it extends to such case, does not take away the jurisdiction of a court of equity to marshal the securities so as to adjust the equitable rights of the rival claimants. *Ib.* 148.
36. *Specific performance of contract; when decreed against priors.*—The rule is, that when specific performance of a contract would be decreed between the original parties, it will be decreed between all persons claiming by privity under them, unless some intervening equity prevents; and a purchaser of land, with notice of a prior executory contract for the sale of the same land, stands in the shoes of his vendor, and holds his acquired title as trustee, and subject to the equities of the prior purchaser. *Meyer Bros. v. Mitchell*, 475.
37. *Settlement of administration on decedent's estate; when probate court*

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*without jurisdiction.*—Jane R. died leaving her brother, Richard R., one of her heirs at law and distributees. Afterwards he died, and his estate was declared insolvent. At the time of his death, he was a large debtor to the estate of Jane R., and the claim was regularly proved and filed against his insolvent estate. C. is, and for many years has been the administrator of both estates. The settlement of the administration of Jane R.'s estate has been removed into, and is pending in the chancery court. C., as administrator of the insolvent estate of Richard R., having been cited to make a final settlement of his said administration in the probate court, pleaded the facts stated above, as ousting the jurisdiction of that court to make the settlement. *Held*, that neither estate could be completely settled, without taking into the account the settlement of the other, thus requiring the largely flexible powers of a court of equity; and that the powers of the probate court being inadequate to administer just and final relief in the premises, that court was without jurisdiction to make the settlement. *Clark, Adm'r v. Head, Adm'r, 373.*

38. *Mortgage of homestead; jurisdiction of court of equity.*—A court of equity will assume jurisdiction to reform a mortgage of a homestead belonging to a married man, and executed and acknowledged by him and his wife in strict conformity with the statute, by correcting the description of the conveyed premises, where the premises are described in the mortgage as containing a stated number of acres, and including the family residence, stables and other improvements, and the desired reformation does not seek to increase the quantity of the lands conveyed, or to locate them in a different section, but merely to correct an admitted error in the designation of the subdivisions of the same section. *Gardner & Gates v. Moore, 394.*
39. *Same; jurisdiction distinguished from other cases.*—This case distinguished from cases in which the specific performance of an agreement of a married woman to convey is sought, and from cases, in which the power of the court is invoked in aid of the defective execution of a statutory power. *Ib. 394.*
40. *Fraudulent conveyances; intervention of court of equity in aid of creditors.*—At common law, independent of statute, a court of equity would intervene in aid of a creditor who had obtained judgment and execution at law, to remove fraudulent transfers or conveyances of property upon which the judgment or execution operated a lien; and also, on a return of execution "no property found," to reach and subject assets not subject to execution at law. *Mathews v. Mobile Mutual Ins. Co., 85.*
41. *Same; effect of filing of bill on priority of liens.*—Where the purpose of the suit is to reach equitable assets, the filing of the bill, being in the nature of an equitable levy, creates a lien on the assets sought to be subjected, which is prior to, and prevails against the demands of creditors subsequently coming in, though they are senior judgment creditors, and, at law, may have a priority of right to satisfaction from legal assets; but where the aid of the court is sought to subject property on which there is an execution lien, the filing of the bill, not being the creation of a new or other lien, but, like a levy, merely individualizing and rendering the general lien of the execution specific as to the particular property sought to be subjected, does not disturb the priority of liens theretofore existing on the property. *Ib. 85.*
42. *Same; filing bill does not displace lien of judgment creditor under execution.*—A simple contract creditor, proceeding under the statute in a court of equity to have vacated and set aside fraudulent conveyances or transfers of property subject to execution at law,

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does not thereby acquire a preference over a judgment creditor who has a prior lien under an execution duly issued, and in the hands of the sheriff at the time of the filing of the bill. *Ib.* 85.

43. *Court of equity, dealing with legal rights, follows rules of law.*—A court of equity, in dealing with legal rights, adopts and follows the rules of law, in all cases to which those rules are applicable; and whenever there is a direct rule of law governing the case in all its circumstances, the court is as much bound by it as would be a court of law, if the controversy was there pending. *Ib.* 85.
44. *When land charged with reimbursement of money used in its purchase.*—K., holding three promissory notes made by S., payable to himself, and secured by a mortgage on lands, traded and transferred one of the notes to R. for a valuable consideration. S. having made partial payments to K., but leaving unpaid to him a considerable balance, K. sold the lands under a power contained in the mortgage, and at the sale A. was set down as the purchaser at a price greater than the amount due to R., but less than the amount due to K. No money was paid on this purchase, but K. conveyed title to A., who immediately reconveyed to K., no money passing, K. merely entering a credit on the mortgage of the amount bid at the sale. *Held,*
  - (a) That this was, in effect, an investment by K. of the funds realized from the sale, in the lands.
  - (b) That when K. made the sale, the proceeds being primarily due to R., it was his duty to pay the latter's demand before applying any of the proceeds to his own claim.
  - (c) That by investing the money in lands, instead of paying it to R., K. armed R. with the right to have a lien declared on the lands purchased for the payment of the money thus improperly invested. *Knight v. Ray, 383.*
45. *Equity of wife in lands purchased by the husband with her money; when inferior to execution lien of judgment creditor.*—Where the husband invests money belonging to his wife, as her statutory separate estate, in lands, and takes the title in his own name, the equity of the wife to charge the lands with the moneys so invested is inferior and subordinate to the lien of a judgment creditor of the husband under an execution issued on the judgment, when, at the time the lien was acquired, the creditor had no notice, actual or constructive, of the wife's equity. *Banks v. Thompson, 531.*
46. *Lis pendens as constructive notice.*—It is settled in this State, that to constitute *lis pendens* constructive notice of claim or asserted ownership, not only must the suit be instituted, but process must be issued and served. *Ib.* 531.
47. *Same.*—Hence, the mere filing of a bill in equity by a wife against her husband alone, seeking to charge lands purchased by, and conveyed to him, with a trust for moneys belonging to her as part of her statutory separate estate, which he had invested in the lands, does not operate as constructive notice of the wife's equity to a judgment creditor of the husband, who had acquired a lien on the lands by issue of an execution prior to service on the husband. *Ib.* 531.
48. *Corporations invested with right of eminent domain; jurisdiction to enjoin from appropriating land without making compensation.*—The principle upon which a court of equity proceeds in interfering to prevent bodies corporate having compulsory power to enter upon, and to take and appropriate for their own uses, the lands of others, differs materially from the principle upon which it intervenes to prevent the commission or continuance of waste, nuisances or trespasses, when only private rights, or the rights of persons, natural or artificial, not having such powers, are involved; the



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- court intervening, in such cases, because of the necessity to keep such corporations within control and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. *East and West R. R. Co. of Ala. v. East Tenn., Va. & Ga. R. R. Co.*, 275.
49. *Same; when bill contains equity.*—Hence, averments in a bill filed by one railroad corporation against another, to enjoin the defendant from constructing its railroad on the complainant's right of way, that the defendant has wrongfully taken possession of lands of which the complainant was possessed, and is appropriating the same to its uses, that it had not proceeded to the condemnation of the lands in the mode prescribed by law, and had not, in obedience to the Constitution, made just compensation therefor, give the court jurisdiction to prevent the further invasion of the property by the defendant, without regard to any question of irreparable injury. *Ib.* 275.
  50. *Same; when court will not interfere.*—If, however, in such case, the right and title of the complainant are not clear, or if the whole controversy resolves itself into a naked dispute as to the strength of the legal title, and it is not shown that an action of trespass or of ejectment will not afford all necessary relief, the court will not intervene by injunction. *Ib.* 275.
  51. *Same; when injunction against should be dissolved on denials in answer.*—Where, by the averments of such bill, the complainant's title to the lands in controversy is based wholly on the fact of continuous, uninterrupted possession by it and those under whom it claims, and the defendant, in its answer, verified by affidavit, directly and unequivocally denies the fact of possession by the complainant at the time of the entry upon, and taking of the land, and also the prior possession by the complainant, or by those under whom it claims, and avers that the title and possession resided with other parties, from whom the defendant had a license or conveyance, under which it entered, and commenced the appropriation of the land, the temporary injunction, issued on the filing of the bill, should, on motion, be dissolved; it being clear that less injury would result to the complainant from its dissolution, than would result to the defendant from its continuance to the final hearing. *Ib.* 275.
  52. *Trespass to land; when court of equity will not enjoin.*—While a court of equity has jurisdiction to restrain the commission or the continuance of trespasses to lands, it will not intervene when the title is purely legal, and the property is not of peculiar value, unless the remedy at law is inadequate, or there is a necessity for intervention to prevent irreparable injury. *Western Union Tel. Co. v. Judkins*, 428.
  53. *Injunction against corporation exercising power of eminent domain without making compensation; when granted.*—The general rule is, that if a corporation, having the right to take lands in the exercise of the power of eminent domain, enters upon them without making just compensation to the owner, a court of equity will intervene for the protection of the owner until such compensation is made; but the application must be seasonably made, the right to relief being lost by laches in seeking the protection of the court. *Ib.* 428.
  54. *Same; when right to relief lost by laches.*—Where lands on which a telegraph corporation had entered and erected its poles, without having first made just compensation to the owner, were sold, and the purchaser allowed more than two years to elapse after he acquired title before he made any complaint of the wrongful act, the

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- laches of himself and of his predecessor in title exclude him from the aid of a court of equity by injunction. *Ib.* 428.
55. *Injunction against waste by tenant in possession; what necessary to relief.*—While a court of equity has, and will fully exercise its preventive jurisdiction, by injunction, to protect the reversion against waste by the tenant in possession, it will not interfere, unless it is shown that a positive injury to the premises, repugnant to the terms of the lease, or a positive misuse of the premises, or their conversion to uses unauthorized, is contemplated and reasonably apprehended. *McDaniel v. Callan*, 327.
56. *Same.*—Hence, where, by the terms of the lease, the tenant is not only expressly authorized, but is required, as one of the considerations moving the landlord in its execution, to reduce to cultivation during the term uncleared portions of the demised premises, a court of equity will not intervene by injunction to restrain him from cutting down timber on the lands, for the purpose authorized by the lease. *Ib.* 327.
57. *Nuisances; jurisdiction of court of equity to restrain.*—The jurisdiction of a court of equity to restrain nuisances rests on the imperative necessity of preventing irreparable injury and a multiplicity of suits at law, and should be cautiously and sparingly exercised. Hence, an injunction against a private nuisance will not be granted on account of a trifling discomfort or inconvenience suffered by the party complaining, but only where there is a strong and mischievous case of pressing necessity. *Rouse & Smith v. Martin & Flowers*, 510.
58. *Same; each case decided upon its own particular facts.*—Where it is sought to restrain by injunction the prosecution of a business or vocation which is lawful in itself, on the ground that it is obnoxious to the public health, comfort or convenience of the neighborhood, by reason of disagreeable noises, offensive odors, noxious gases and the like, no general rule can be laid down sufficiently specific and certain to apply to all cases; but each case must be decided upon its own particular facts, the whole question being one largely of degree, to be determined in the light of human experience. *Ib.* 510.
59. *Same; when court of equity will not enjoin.*—Where an injunction is sought to restrain the construction of works which are of such a nature that it is impossible for the court to know, until they are completed and in operation, whether they will or will not constitute a nuisance, the writ will be refused in the first instance. The mere fact of the diminution in the value of complainant's property, or the increased risks of fire, occasioned by the erection of such works upon an adjoining lot, in a town or city, without more, is not sufficient ground for equitable relief. *Ib.* 510.
60. *Same; when court of equity will not enjoin erection of a steam gin-house.*—Ginning cotton being a useful business, common to the country, and not necessarily a nuisance, a court of equity will not interfere by injunction to restrain the erection of a building with machinery for ginning cotton by steam, on a lot in a city about eighty-eight feet from the complainant's residence, and separated from it by a public street, when the injury sought to be prevented is merely anticipated, is greatly a matter of speculation, and it is not clearly shown that it is not reasonably possible for the business to be conducted so as not to be a nuisance. *Ib.* 510.
61. *Relief of married women from disabilities of coverture; statute strictly construed.*—The statute conferring on the chancellors of this State power to relieve married women of the disabilities of coverture (Code, 1876, §§ 2731-2), is the delegation of power which is in its nature not strictly judicial, but is a part of the general preroga-

CHANCERY—*Continued.*

tive power of the General Assembly to define or change the legal *status* of citizens, upon whom the general law had imposed special disabilities; and, like all other statutory powers, it must be exercised in the mode, and for the purposes the statute appoints and declares. *Falk v. Hecht*, 293.

62. *Same; what essential to validity of decree.*—The mode appointed by the statute for calling such power or jurisdiction into exercise, is by a petition, or an application in the nature of a petition, filed by the wife through her next friend, and disclosing the facts which authorize the court to proceed to the rendition of the decree; and if the wife be not the actor, or if she is the actor, and the petition does not disclose the facts upon which the court is authorized to proceed to the rendition of the decree, all subsequent proceedings are *coram non judice*, and invalid. *Ib.* 293.
63. *Same; when petition insufficient.*—Under the statute, the chancellor has no jurisdiction to confer on a married woman the capacity to engage in business, to become a sole trader, or to mortgage lands, solely and separately; and hence, a petition filed by a married woman, which, after averring the citizenship of herself and husband, her ownership of lands described as her statutory separate estate, that she desires to invest her means in the purchase of a stock of goods and groceries, and that unless she can mortgage her lands she can not make the investment, prays that the chancellor will render a decree, "declaring her a free-dealer, relieving her of the disabilities of coverture as to her said statutory separate estate, so far as to invest her with the right to mortgage the same, to enable her to invest her means in purchasing a stock of goods and groceries," does not conform to the requirements of the statute; and a decree rendered thereon, though following the words of the statute, is unauthorized and void. *Ib.* 293.
64. *Relief of married woman from disabilities of coverture; what essential to.*—Under the statute authorizing chancery courts to relieve married women of the disabilities of coverture, approved April 15, 1873, an indispensable element of jurisdiction is the petition of the wife, declaring her wish to become a *feme sole*, so far as the statute authorizes the court so to decree and declare her; and while this element of jurisdiction must affirmatively appear on the face of the proceedings, or they will be *coram non judice*, it is not essential that the words of the statute should be strictly pursued, or that any particular words or phrases should be employed; a statement or affirmation in any terms, clearly importing her desire to avail herself of the statute, being sufficient. *King v. Bolling*, 306.
65. *Same.*—If the petition, in such case, admits equally of two constructions, on collateral attack, that construction must be adopted which will support rather than that which will nullify the decree. *Ib.* 306.
66. *Same; when decree valid.*—Where the wife's petition avers her residence and coverture, her husband's name and citizenship, and her ownership of property, real and personal, and "*asks and prays*" that she "be declared a free-dealer under the laws of Alabama, with the right to buy and sell, hold and convey real or personal property, to sue and be sued as *feme sole*, as provided by" the act approved April 15th, 1873, which is referred to by caption and date of approval, this is a substantial compliance with said act, and, on collateral attack, is sufficient to uphold a decree relieving her of the disabilities of coverture to the extent authorized thereby. *Ib.* 306.
67. *Same; when consent of the husband sufficient.*—The term *free-dealer*, used in the written consent of the husband accompanying such



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petition, must be accepted in the same sense in which it is used in the petition; and so accepting it, it is the consent required by the statute. *Ib.* 306.

68. *Enforcement of lien on lands which have been successively sold to different parties; rule as to.*—While it is a general rule, that, if lands subject to a vendor's lien or other incumbrance have been successively sold in different parcels to different persons, a court of equity, in decreeing a sale of the lands for the satisfaction of the lien or incumbrance, will pursue the inverse order of alienation, first, however, charging such of the lands as the vendee may retain, if he retains any, this is an equity of the purchasers, and must be claimed and asserted by them; and if not claimed and asserted, it is not obligatory upon the court, unless the rights of infants, or others not *sui juris* are involved, to mould its decree so that the equity will be enforced. *Prickett & Maddox v. Sibert, Adm'r, 315.*

See ASSIGNMENT, 1; ATTORNEY AND CLIENT, 1, 2; ESTOPPEL; FRAUD; FRAUDULENT CONVEYANCES; VENDOR AND PURCHASER; WATERS; WILLS.

## II. PLEADING AND PRACTICE.

69. *Bill in equity; rule of pleading.*—It is a cardinal rule of equity pleading under the statute, as it was prior to its enactment, that the bill must show by direct and positive averments, with clearness and accuracy, all matters essential to the complainant's right to relief; they must not be made to depend upon inference, nor will averments of them which are ambiguous, uncertain and inconclusive, be accepted as sufficient. *Seals v. Robinson, 363.*
70. *Bill in double aspect; when defect not reached by motion to dismiss or general demurrer.*—While a bill in equity framed in a double aspect is demurrable, if either aspect is insufficient to support the right of complainant to relief, advantage of the defect must be taken by demurrer specifying the ground of objection, and affording complainant an opportunity of removing it by amendment; advantage of it can not be taken by motion to dismiss for want of equity, or by general demurrer. *Ib.* 363.
71. *Motion to dismiss bill for want of equity; its office.*—A motion to dismiss a bill for want of equity is not the equivalent of a demurrer, and is not appropriate to reach mere defects or insufficiencies of pleading curable by amendment; but it should be entertained only when, admitting the facts apparent on the face of the bill, whether well or illy pleaded, the complainant is without right to equitable relief. *Ib.* 363.
72. *Objections to evidence in equity; practice in reference to.*—In chancery, objections to the admissibility of evidence ought to be reduced to writing, and a reference to them should be incorporated in the note of submission, or they should otherwise be called directly to the chancellor's attention; and if this is not done, and the chancellor fails to notice them, the presumption is indulged that they were waived. *Ib.* 363.
73. *Bill to set aside fraudulent conveyances; when not multifarious.*—A bill in equity by a creditor, seeking to vacate and set aside several conveyances of the debtor's property as fraudulent, and to subject the property to the satisfaction of his demand, is not multifarious, because the several grantees, who are joined as parties defendant, acquired different portions of the property under separate and distinct conveyances, executed at different times, the bill imputing to the defendants a common knowledge of the debtor's fraudulent in-

CHANCERY—*Continued.*

- tent, and a common purpose of participation in it, by mutual combination. *Russell v. Garrett, Adm'r, 348.*
74. *Same.*—Nor is such a bill subject to the objection of multifariousness, because a portion of the indebtedness due the complainant from the debtor consisted of a claim for which one of the grantees, who is a defendant, was also liable as partner, no relief being claimed against such grantee on the debt, except so far as it may constitute the complainant a creditor of the grantor and principal debtor. *Ib. 348.*
75. *Bill of discovery; what is not.*—Where the only discovery sought in a bill in equity is purely incidental, being such as may be elicited by the interrogating part of the bill, consisting of a series of questions intended to obtain discovery in aid of the complainant's case, and required to be directed to facts previously stated or charged, the bill can not be treated as one for discovery alone, or its sufficiency tested by the rules governing that class of bills. *Ib. 348.*
76. *Waiver of answer under oath; may be incorporated in interrogating part of bill.*—While it is the more common practice to waive an answer under oath to a bill in equity in the foot-note required to be appended to the bill, it may be done in the interrogating part of the bill; this being plainly authorized by the statute, and not prohibited by the 13th Rule of Chancery Practice. *Ib. 348.*
77. *Want of proper pleadings; when may be waived.*—When the court has jurisdiction over the subject-matter, and the necessary parties are before it, by consent, the want of appropriate pleadings may be waived, and questions not presented by the pleadings may be submitted for the consideration and decision of the court; but, in such case, a decree that passes beyond the agreement of the parties, and is without proper pleadings to support it, is erroneous. *Clark, Adm'r, v. Rose, 129.*
78. *When complainant must fail for want of proof.*—When an affirmative fact is pleaded in a bill in equity as the basis of the relief prayed, and the fact is denied by the defendant in his answer, the burden of proof being on the complainant, if the evidence touching the fact is equally balanced, or if the evidence does not produce a just, rational belief of its existence, if it leaves the mind in a state of doubt and uncertainty, the party affirming the fact fails for want of proof. *Hawes v. Brown, 335.*
79. *Bona fide purchase; proof of.*—The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment, it being affirmative defensive matter, in the nature of confession and avoidance; but this done, he need not go further, and prove that he made such purchase and payment without notice. The burden here shifts, and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof that before the payment the purchaser had actual or constructive notice of the equity or lien asserted, or of some fact or circumstance, which was sufficient to put him on inquiry, and which, if followed up, would have discovered the equity or incumbrance. *Barton v. Barton, 400.*
80. *Sworn answer to bill in equity; when not evidence.*—An answer to a bill in equity, though sworn to, is worthless as evidence, in so far as it sets up independent matter—matter not responsive to any averment in the bill. *Ib. 400.*
81. *Specific performance of contract for sale of lands; when averments of bill insufficient.*—Proof without allegation is as fatal to relief as is allegation without proof; and hence, in a suit in equity for the specific performance of a contract for the sale of lands, which, unaided by extraneous evidence, is void for uncertainty in the de-

CHANCERY—*Continued.*

- scription, relief can not be granted in the absence of averments identifying the lands, although they are sufficiently identified by the proof. *Meyer Bros. v. Mitchell*, 475.
82. *Deposition ; when motion to suppress properly overruled.*—The deposition of a party examined as a witness in his own behalf should not be suppressed on the ground of a failure on his part to answer certain cross-interrogatories propounded to him, when there is nothing in his answers evincing an effort to evade the disclosure of facts within his knowledge, and, considering his comparative intelligence, all the questions propounded to him on cross-examination seem to have received answers fairly and substantially responsive. *Ib.* 475.
83. *Exceptions to testimony ; when failure of chancellor to rule on, without injury.*—The failure of the chancellor to rule on exceptions to testimony, if it can be regarded as error, is error without injury, when his decree can be sustained by other testimony, to which no exceptions were taken. *Ib.* 475.
84. *Cross-bill ; when properly dismissed.*—A cross-bill not seeking a discovery, and making no defense which is not equally available by answer, should be dismissed ; hence, it was held that the decree dismissing the cross-bill filed in this cause was free from error. *McDaniel v. Callan*, 327.
85. *Variance between allegations and proof ; when fatal to relief.*—If redundant allegations are introduced into pleadings, and they are descriptive of that which is material, a variance between the allegations and proof is fatal, of the same consequence as a variance between the allegation of an essential fact, and the proof of that fact. *Gilmer v. Wallace*, 220.
86. *Same.*—Hence, where, in a bill in equity filed by a mortgagor to have the mortgage declared satisfied, and to enjoin a sale of the mortgaged premises, on the ground that the debt secured by the mortgage had been fully paid, a general averment of the fact of payment is followed by particular averments, stating the time, mode and source of payment, and describing the particular transaction from which it was derived, a variance between such particular averments and the proof is fatal to the relief sought, although the evidence may show that the debt has been paid, but in a mode, and from a source different from those averred in the bill. *Ib.* 220.
87. *When decree in vacation, dismissing bill for variance, erroneous.*—It is error for the chancery court to dismiss a bill in vacation, on account of a variance between the allegations and proof, without affording the complainant an opportunity to amend, if there is "any state of evidence which will authorize relief ;" and in determining whether there is such a "state of evidence," it is not necessary or proper to pass upon the weight of the evidence, or to enter upon an examination of the evidence introduced on behalf of the defendant ; but it is sufficient that the evidence for the plaintiff makes out a *prima facie* case, entitling him to relief, the effect of which the defendant must overcome. *Ib.* 220.
88. *Bill to foreclose mortgage by assignee of debt ; when mortgagee a necessary party.*—While in equity an assignment of a debt secured by a chattel mortgage, if not otherwise expressed, operates an assignment of the mortgage, entitling the assignee to its foreclosure, yet, the mortgagee, having the legal title, is an indispensable party, in whose absence the court will not proceed to a decree. *Fulgham v. Morris*, 245.
89. *Mortgage securing debt payable in installments ; when may be foreclosed.*—When a debt secured by mortgage is payable in installments, ordinarily, and in the absence of stipulations to the con-



CHANCERY—*Continued.*

- trary, the mortgage is forfeited *pro tanto* by default in the payment of any installment as it falls due, and the mortgagee may proceed to a foreclosure; and if before final decree, other installments become due, they should be embraced in the decree. *Ib.* 245.
90. *Same; effect of payment of past due installment after bill filed.*—The mortgagor, by paying the installments of such debt which are past due, after bill filed for a foreclosure, is entitled to put a stop to further proceedings; and, if he make such payment, the court has no power to render a conditional or provisional decree of foreclosure, if default should be made in the payment of the installments falling due in the future. *Ib.* 245.
91. *Grant of injunction by officer without authority; remedy for correction of error.*—When an injunction is granted by a judicial officer who has no authority to grant it, the error or irregularity is only available upon motion for a discharge of the injunction, which must precede any act on the part of the defendant in recognition or affirmance of its regularity. In such case, a motion to dissolve is not the appropriate remedy, but is a waiver of the error or irregularity. *East & West R. R. Co. v. East Tenn., Va. & Ga. R. R. Co.*, 275.
92. *Motion to dissolve injunction for want of equity; what inquiries opened by.*—A motion to dissolve an injunction for want of equity in the bill can not perform the office of a demurrer to the bill; but, on the hearing of such motion, all amendable defects should be regarded, *pro hac vice*, as cured by amendment, and the inquiry made, whether, if the facts were well pleaded, the case would be of equitable jurisdiction, and an injunction the appropriate remedy. *Ib.* 275.
93. *Motion to dissolve injunction by party in contempt; when entertained.* A party in contempt for a real, substantial, not a mere technical disobedience of an injunction, a disobedience calling for punishment, will not be heard on a motion for its dissolution until the contempt is purged; but the motion may be entertained where the nature and extent of the punishment to be imposed for the contempt depend on the determination of the question, whether the injunction shall be continued or dissolved, and involves essentially the inquiry, whether it was not, in the first instance, improvidently granted. *Crabtree v. Baker*, 91.

See AMENDMENTS, 1-7; JURISDICTION AND GENERAL PRINCIPLES, *supra*, 8, 11, 14, 15, 16, 17, 18, 19, 22, 23, 29, 30, 51, 63-68.

## CHARGE TO JURY.

1. *When free from error.*—Reading to the jury, as part of the court's general charge, extracts from reported decisions of this court, accompanied with instructions adapting them to the particular case, is free from error. *Holley v. State*, 14.
2. *When invasive of province of jury.*—The weight to be given evidence is a question for the jury; and a charge which withdraws it from their consideration, is an invasion of their province. *Hughes v. State*, 31.
3. *When argumentative.*—A charge asked, which asserts that the "law books are full of cases of mistaken identity," is argumentative, and, for that reason, is properly refused. *Ib.* 31.
4. *Charge given and withdrawn; error without injury.*—When a charge, given by the court of its own motion, is withdrawn from the consideration of the jury during the progress of the trial, if it contain error, it is error without injury, and will not work a reversal. *Huckabee v. Shepherd*, 342.

## CHARGE TO JURY—Continued.

5. *When abstract*.—A charge requested, which is based, in whole or in part, on a state of facts, of which there does not appear to have been any evidence whatever, is abstract, and is properly refused. *Martin, Dumee & Co. v. Brown, Shipley & Co., 442.*

## CODE, 1876.

1. § 701. Terms of probate court. *Blake v. Harlan, 205; Carlisle v. May, 502.*
2. § 710. Return of executions in probate court. *Carlisle v. May, 502.*
3. § 721. Clerk of county court; powers of. *McLeod v. McLeod, 483.*
4. § 1336. Certificate of protest as evidence of notice. *Martin, Dumee & Co. v. Brown, Shipley & Co., 442.*
5. §§ 1699, 1700. Duty of railroad engineer to ring bell, etc.; liability for failure to do so. *Alabama Great Southern R. Co. v. McAlpine & Co., 113; East Tenn., Va. & Ga. R. R. Co. v. Bayliss, 466.*
6. § 2120. Conveyances of personalty in trust for benefit of grantor void. *Benedict, Hall & Co. v. Renfro Bros., 121.*
7. § 2121. Statute of frauds. *Singer Man'g Co. v. Sayre, 270; Westmoreland v. Porter, 452; Meyer Bros. v. Mitchell, 475.*
8. § 2218. Power of sale to executors; when administrators may execute. *Watson v. Martin, Adm'r, 506.*
9. §§ 2222-23 (as amended). Penalty for failure to enter of record satisfaction of mortgage. *Jarratt v. McCabe, 325; Scott v. Field, 419.*
10. § 2239. Assignment of dower. *Turnipseed v. Fitzpatrick, 297.*
11. §§ 2439-41. Duty of administrator as to crops commenced by decedent. *Taylor, Adm'r, v. Bush, 432.*
12. § 2446. Power of personal representative to rent lands. *Vandegrift, Adm'r, v. Abbott, 487.*
13. § 2449. Sale of land by personal representative for division. *Rice v. Drennen, Adm'r, 335.*
14. § 2520. Liability of personal representative for interest. *May, Adm'r, v. Green, 162.*
15. §§ 2531-32. Partial settlements of decedents' estates; presumption of correctness. *Taylor, Adm'r, v. Bush, 432.*
16. § 2681. Penalty against probate judge for improperly issuing marriage license. *Roberts v. Pippen, 103; Fulghum v. Roberts, 341.*
17. § 2706. Liability of husband for income of wife's statutory estate. *Kenyon v. Dibble, 351; Voltz v. Voltz, 555.*
18. §§ 2707-9. Conveyance of wife's statutory estate. *Warren v. Wagner, 188; Falk v. Hecht, 293; Kenyon v. Dibble, 351.*
19. § 2710. Power of husband to receive wife's property. *May, Adm'r, v. Green, 162.*
20. § 2711. Liability of wife's statutory estate for necessities. *Snyder v. Glover, 379.*
21. § 2731. Removal of disabilities of coverture. *Warren v. Wagner, 188; Falk v. Hecht, 293; King v. Bolling, 306; Voltz v. Voltz, 555.*
22. § 2820. Exemptions. *Murphy v. Hunt, Miller & Co., 438.*
23. §§ 2828-30. Claim of exemptions; contest of. *Clark v. Spencer, 49; Abbott, Downing & Co. v. Gillespy, 180; Alley v. Daniel, 403.*
24. § 2834. Claim and contest of exemption. *Clark v. Spencer, 49.*
25. § 2836. Contest of exemption; giving bond. *Ex parte Haralson & Co., 543.*
26. § 2841. Return of homestead in favor of widow, etc., to probate court. *Jarrell, Ex'r, v. Payne, 577.*

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27. § 2843. Homestead; when not lost by temporary quitting or leasing. *Murphy v. Hunt, Miller & Co.*, 438.
28. § 2844. Exemptions; remedy for asserting and determining claim. *Clark v. Spencer*, 49.
29. § 2890. Suits on contracts to pay money; in whose name brought. *Daughtery v. Amer. Union Tel. Co.*, 168.
30. § 2892. Joinder of husband and wife as parties plaintiff. *Wortham v. Gurley*, 356.
31. § 2899. Right of action in parent against corporation for death of child. *Smith v. Louisville & Nashville R. R. Co.*, 449.
32. § 2944. Damages for detention of property in detinue. *Wortham v. Gurley*, 356.
33. §§ 2951-54. Suggestion of adverse possession; value of permanent improvements. *Turnipseed v. Fitzpatrick*, 297.
34. § 2958. Motion for recovery of rent accruing after judgment. *Kirkland v. Trott*, 321.
35. § 2966. Liability of parties holding under color of title, etc., for rent for one year. *Turnipseed v. Fitzpatrick*, 297.
36. §§ 2987, 2990. Pleas; character of, how determined. *Mohr v. Chaffe Bros. & Co.*, 387.
37. § 2996. Set-off; statute of limitations. *Jeffries v. Castleman*, 262.
38. § 3036. Execution of writings the foundation of suits; when self-proving. *Meyer Bros. v. Mitchell*, 475.
39. § 3041. Right of officer to justify under process regular on its face. *Meyer v. Hearst*, 390.
40. § 3111. Motion to establish bill of exceptions. *Blake v. Harlan*, 205.
41. § 3113. Bill of exceptions. *Blake v. Harlan*, 205.
42. § 3144. Witnesses to prove one fact; costs only allowed to two. *Beadle v. Davidson*, 494.
43. § 3154. Amendment of record within three years after judgment. *Stoutz, Adm'r, v. Rouse*, 431.
44. § 3196. Bond of indemnity to sheriff; his duty to proceed on execution of. *Alley v. Daniel*, 403.
45. § 3210. Lien of execution. *Mathews v. Mobile Mutual Ins. Co.*, 85; *Carlisle v. May*, 502.
46. § 3226. Statute of limitations of six years. *Kirkland v. Trott*, 321.
47. § 3231. Statute of limitations of one year. *Kirkland v. Trott*, 321.
48. § 3242. Statute of limitations, when there is a fraudulent concealment of cause of action. *Holt v. Wilson*, 58.
49. § 3285. Bond of indemnity to sheriff; his duty to proceed on execution of. *Alley v. Daniel*, 403.
50. § 3314. Abatement of attachment. *Mohr v. Chaffe Bros. & Co.*, 387.
51. § 3315. Amendment in attachment proceedings. *Mohr v. Chaffe Bros. & Co.*, 387.
52. § 3343. Trial of right of property; damages for delay. *Murphy v. Butler, Pitkin & Co.*, 381.
53. § 3467. Landlord's lien for rent and advances. *Bell & Co. v. Hurst & McWhorter*, 44; *Lake & Marshall v. Gaines & Co.*, 143; *Drakford v. Turk*, 339.
54. §§ 3497 et seq. Partition among tenants in common. *McMath v. DeBardelaben*, 68; *McCorkle v. Rhea*, 213.
55. § 3514. Sale of property for distribution among tenants in common. *Turnipseed v. Fitzpatrick*, 297.
56. § 3564. Erection of mill-dam; charge to jury. *McAulley v. Horton*, 491.
57. § 3696. Forceful entry and detainer; character of possession to maintain. *Brady v. Huff*, 80.



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- 58. § 3705. Forcible entry and detainer; bar to recovery. *Brady v. Huff*, 80.
- 59. § 3758. Statute of limitations in equity. *Cotton v. Cotton*, 345.
- 60. § 3761. Bill in equity; statement of facts and prayer for relief. *Seals v. Robinson & Co.*, 363.
- 61. § 3790. Amendment to bill in equity. *Ward, Adm'r, v. Patton*, 207; *Prickett & Maddox v. Sibert, Adm'r*, 315; *Gilmer v. Wallace*, 220; *Adams v. Phillips, Ex'rs*, 461.
- 62. § 3886. Right of simple contract creditor to subject property fraudulently conveyed. *Mathews v. Mobile Mutual Ins. Co.*, 85.
- 63. § 3893. Practice in partition suits. *McMath v. DeBardelaben*, 68.
- 64. § 4207. Card playing at public place. *Johnson v. State*, 7.
- 65. § 4209. Betting at cards, etc. *Johnson v. State*, 7.
- 66. § 4289. Illegal voting. *Washington v. State*, 582.
- 67. § 4295. Murder. *Holley v. State*, 14.
- 68. § 4450. Legal punishment; how imposed. *Hobbs v. State*, 1.
- 69. §§ 4465-69. Hard labor. *The State v. Metcalfe*, 42; *Arrington v. Morgan*, 606.
- 70. § 4718. Trial in county court. *Bell v. State*, 25.
- 71. § 4802. Accessories and principals. *Hughes v. State*, 31.
- 72. § 4874. Venue in capital case. *Bland v. State*, 574.
- 73. § 4895. Conviction on testimony of accomplice. *Snoddy v. State*, 23.
- 74. § 4963. Habeas corpus. *Ex parte Dover*, 40; *Ex parte McGlawn*, 38; *Ex parte Murphy*, 409.
- 75. § 5032. Sheriff's fees. *Kahn, Wolf & Sons v. Locke*, 332.

## COMMON CARRIER.

1. *Action against railroad company for personal injuries; variance.*  
Where, in an action by a passenger against a railroad company, to recover damages for personal injuries, the complaint alleges that the plaintiff "was compelled and forced by the agents of said defendant to get off defendant's train while in motion, and before said train had reached the usual place at the depot," and that injuries sustained by him were produced by the negligence of defendant's agents "in compelling and forcing" him to get off the train, the gravamen of the action is the alleged force, and is not sustained by evidence merely, that, when the train was approaching the platform at the depot, the conductor came towards him in the car, crying out the name of the station, and saying, "We have got no time, hurry up," and that this was repeated by the conductor several times while the plaintiff was making his egress from the car, and before he stepped from the moving train; such words not being susceptible of a construction which would impute to the conductor any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it. *South & North Ala. R. Co. v. Schaffer*, 136.
2. *Same; contributory negligence.*—A passenger on a railroad train, who, encumbered with hand-baggage, steps from the train on a dark night, while it is moving at the rate of six or eight miles per hour, before it has reached the platform of a regular station, at which he was to get off, and with the locality of which he is acquainted, against the advice of the conductor, and without reason to believe that the train would not stop, as usual, at the platform, is guilty of contributory negligence, which bars him from recovering damages for personal injuries sustained in stepping from the train. *Ib.* 136.
3. *Same; advice or direction of conductor no excuse for plaintiff's negli-*

COMMON CARRIER—*Continued.*

- gence.*—Where an adult passenger leaves a moving train under the advice or direction of the conductor in charge of the train, and, in leaving the train, receives personal injuries, it seems to be settled by the authorities, that such advice or direction, though plain and unambiguous, can not be held to excuse an act of negligence on the part of the passenger, which is so opposed to common prudence as to make it an obvious act of recklessness or folly. *Ib.* 136.
4. *Same; whether negligence is excused by advice of conductor, when a question for the jury.*—It seems also to be settled by the authorities, that if, in such case, the act advised to be done is one, in the doing of which the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused. *Ib.* 136.
  5. *Action against common carrier for failure to deliver baggage; when description of baggage sufficient.*—In an action by a passenger against a common carrier for damages for failure to deliver baggage, a description of the baggage in the complaint as "one trunk," containing designated articles of jewelry and merchandise, and "clothing and personal wearing apparel," is, on demurrer, sufficiently certain. *Montgomery & Eufaula R. R. Co. v. Culver*, 587.
  6. *Same; what a fatal variance between allegation and proof of contract.* Where, in an action by a passenger against a corporation operating an intermediate line of railroad, for damages for the failure to deliver baggage, the contract is alleged to have been made with the defendant for the transportation of the baggage to a designated point, which is situate on the last connecting line, to be there delivered to the plaintiff, and the proof shows that the contract was made with the company operating the first connecting line, and is an agreement on the part of the defendant for the transportation and delivery of the baggage, not to the plaintiff at the point of destination, but to the company operating the last connecting line, there is a variance between the allegations and proof, which is fatal to the right of recovery. *Ib.* 587.
  7. *Liability of common carrier for baggage; extent of; burden of proof.*—Transportation of baggage, as such, is incidental to the carriage of the owner as a passenger, and for its safe delivery, a common carrier is liable in the same manner, and to the same extent as carriers of merchandise; and if the carrier is both the receiving and delivering carrier, or liable for the safe delivery of baggage at the point of destination, proof that it was in good condition when received, and in damaged condition when delivered, casts on him the burden of showing that the damage was occasioned by some cause exempting from absolute liability for safe delivery. *Ib.* 587.
  8. *Railroad companies operating connecting lines; liability for damage.* An arrangement, express or implied, between different connecting railroad companies, authorizing the companies operating the terminal roads to issue to passengers through tickets, and through checks for baggage, each being entitled only to the fare for transportation over its own line, does not render one of them liable for loss or damage to baggage sustained on the road of the other; nor does it impose on the intermediate company absolute liability for safe delivery, but merely the duty to receive from the company issuing the tickets and checks, to safely carry over its own road, and to deliver to the other connecting company. *Ib.* 587.
  9. *Same; presumptions as to first company in case of non-delivery and delivery in bad order.*—Where the contract of the receiving company is not for delivery beyond the terminus of its line, but merely

COMMON CARRIER—*Continued.*

to the connecting company, liability in case of non-delivery at the point of destination, or total loss, is *prima facie* on the receiving company, and on it is cast the burden of showing delivery to the connecting company; but this presumption does not arise in case of a delivery by the connecting company in bad order. (*S. & N. R. R. Co. v. Wood*, 71 Ala. 215, explained and modified). *Ib.* 587.

10. *Same*; *presumption against delivering company in case of delivery in bad order.*—As against the delivering or discharging company, the presumption prevails, in the absence of evidence, that the baggage continued in the same condition as when delivered to the receiving company, and on it is cast the burden, in case of delivery in a damaged condition, of showing the condition of the baggage when received by it. *Ib.* 587.
11. *Same*; *presumption as to intermediate company in case of delivery in bad order by delivering company.*—When baggage is delivered in good order by the receiving company to an intermediate company, and by it delivered to the delivering company, proof that it was in a damaged condition when delivered by the latter at point of destination does not operate, in the absence of other evidence, to cast on the intermediate company the burden of showing that it was in good condition when delivered by it to the delivering company. *Ib.* 587.
12. *Same.*—Hence, in an action by a passenger, having a through ticket and a through check for his baggage over three connecting lines of railroad, operated by separate and independent companies, against the intermediate company for damages for failure to deliver his baggage, which had been received by it in good order from the first company, and which was in a damaged condition when delivered by the last company at the point of destination, no special contract or arrangement between the companies being shown, a charge instructing the jury that if the trunk was delivered to, and received by the defendant in good order, and when it was delivered to the plaintiff at the point of destination, it was badly broken, and its contents taken out, it devolved on the defendant to show that it was delivered in good condition to the delivering company, and if it failed to show this, the plaintiff was entitled to recover, is erroneous. *Ib.* 587.
13. *Common carrier's liability for cattle received by it for transportation; extent of.*—Under the rule adopted in this State, when not modified by special contract, a common carrier, undertaking to transport cattle, assumes the full obligations to furnish safe and suitable vehicles, and an adequate road, and to exercise due care and foresight to guard against loss or injury from external sources; but he does not become an insurer, and his liability does not extend to any damage resulting from the nature, disposition, or viciousness of the animals, or from any intrinsic cause, against which care and foresight could not provide. *East Tenn., Va. & Ga. R. R. Co. v. Johnston*, 596.
14. *Same*; *when special contracts limiting liability upheld.*—Special contracts made by common carriers with shippers of cattle, restricting and avoiding their liability for the unusual risks peculiar to the transportation of such freight, are maintained and upheld by the courts, when the limitations are just and reasonable, and do not exempt the carriers from liability for any loss or injury caused by their own act or negligence. *Ib.* 596.
15. *Same*; *adequacy and sufficiency of vehicles furnished.*—In respect to the adequacy of carriage, a railroad company meets its duty and obligation, when it furnishes such as is most in use, and is approved by persons skilled and experienced in the business, as



COMMON CARRIER—*Continued.*

necessary and proper for safe transportation, having in view the kind and nature of the freight; and the omission of any part or appliance, permanent or usual in the construction or preparation of a car, and which is necessary and proper to its adequacy for the general uses and purposes of railroad transportation, is *prima facie* negligence; but to charge the company with negligence because of the omission of some peculiar, adventitious and temporary preparation, the necessity or propriety must be shown by extraneous evidence. *Ib.* 596.

16. *Same; omission to "bed" car; effect of.*—When the liability of the railroad company is not modified by contract, and he undertakes the transportation of cattle under the common law liability for safe delivery, it can not be affirmed, as matter of law, that the failure to "bed" a car for the transportation of cattle with straw or other material, is negligence *per se*; but if it is shown that such a course is usual and customary, and is such a precaution as a prudent, competent, and faithful man, experienced in the business, would take, the company will be responsible for any injury caused by its omission in this regard. *Ib.* 596.
17. *Same; special contract construed in respect to bedding car.*—Where a shipper of cattle contracts with a railroad company for the use of a car for the transportation of cattle, having reference to the cars in use on the defendant's road, in the absence of any stipulation for any particular kind of car, the extent of the company's obligation is to furnish a safe, serviceable and adequate car, adapted to the use intended; and the shipper retaining control and charge of the cattle, and assuming the risk and responsibility of loading, his understanding of the contract may be inferred from the fact, that he had provided material for bedding the car; and the company will not be held liable for any loss or injury arising from his fault or neglect in this regard. *Ib.* 596.
18. *Same; when not liable for failure to bed car.*—Hence, the shipper, having assumed, by special contract, the duty of proper storage of his cattle and having accepted and loaded the car without objection, and with knowledge that it was not bedded, can not hold the company liable for negligence because of a failure to bed the car, or because of the insufficiency of the bedding. In such case, by his contract he virtually agrees that "in respect of the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence." *Ib.* 596.
19. *Usage; when admissible to interpret contract between common carrier and shipper of cattle.*—When a special contract is entered into between a railroad company and the owner of cattle, for the transportation of the cattle, and it is silent as to the kind of car to be furnished, and as to any special preparation of the car, and, while providing that the shipper shall retain control and charge of the cattle, and assume the risk and responsibility of loading, it is also silent as to what special duties were undertaken by him in these particulars, evidence of a usage or custom, by which he is to bed the car, known to him, and upon which he had acted in making previous shipments, is admissible for the purpose of interpreting and explaining the intention, meaning and understanding of the parties in making the special contract. *Ib.* 596.
20. *Special contract for transportation of cattle; when not unreasonable.* There is nothing unreasonable in the provision of a special contract made by a railroad company for the transportation of cattle, by which the owner assumes the duty of loading, transferring and unloading the cattle; and for any injury caused by overloading, or

COMMON CARRIER—*Continued.*

- other improper loading, the company, if without fault or negligence on its part, is not liable. *Ib.* 596.
21. *Same; when unreasonable and void.*—But a clause in such contract, exempting the company “from all other damages incidental to railroad or steamboat transportation, which shall not be established to have been caused by the gross negligence or delinquency of any of the officers or agent of the said railroad or steamboat companies,” relieving, as it seeks to do, the company from all negligence less than gross, is unreasonable, and can not be maintained. *Ib.* 596.
  22. *Same; burden of proof when injury shown.*—When there is a contract between a common carrier and shipper, limiting the former’s liability, the injury having occurred, the burden of proof is on the carrier to show, not only that the cause of the injury is within the exception, but that the injury did not result from the carrier’s negligence. *Ib.* 596.
  23. *Duty of railroad company in assigning cars in making up trains.* While in making up a train, large discretion must be allowed a railroad company, in assigning cars to different positions, it is, nevertheless, the duty of the company, having regard to the nature and character of all kinds and classes of freight received by it for transportation, to assign a car loaded with freight of a particular nature such position, so far as may be consistent with the safety and interests of other shippers, as will cause the least exposure to danger. *Ib.* 596.
  24. *Same.*—Although a railroad company may have, consistently with its duty to other shippers, placed a car loaded with cattle at a greater distance from the engine, yet, if the injury suffered was not caused by the proximity of the cattle to the engine, the company is not liable therefor, in the absence of negligence on its part causing the loss. *Ib.* 596.
  25. *Measure of damages for injuries to cattle shipped on railroad; what is.*—The measure of damages for injuries to cattle shipped by railroad, resulting in death, is the market value of the cattle at the place of destination, less the expense of transportation, although such place is beyond the terminus of the company’s road, and it was not liable for injury occurring beyond its terminus. *Ib.* 596.

## COMMON LAW.

1. *Common law in Mississippi; presumption as to.*—In the absence of proof to the contrary, this court will presume that the common law prevails in the State of Mississippi. *Gluck v. Cox*, 310.
2. *Statute 17 Edward 2, not of force in this country.*—The statute of 17 Edward 2, Ch. 10 and 19, conferring on the king, as *parens patriæ*, power to take care of the property of lunatics and idiots, though enacted before the settlement, or even the discovery, of this country, being inconsistent with our institutions and form of government, is not of force with us. *Whetstone v. Whetstone’s Ex’rs*, 495.

## CONSTITUTIONAL LAW.

1. *Constitutional inhibition against imprisonment for debt; what not a debt within meaning of.*—Neither fines, forfeitures, nor costs in criminal cases, are debts within the meaning of the constitutional provision, “That no person shall be imprisoned for debt.” *Lee v. State*, 29.
2. *Same; what act not violative of.*—This constitutional provision is not violated by the act of the General Assembly, approved February

CONSTITUTIONAL LAW—*Continued.*

- 23d, 1883, entitled "An act to better secure the payment of fines and costs in criminal cases in the courts of this State" (Pamph. Acts, 1882-3, p. 166). *Ib.* 29; *State v. Leach*, 36.
3. *Damages against corporation for killing minor child; section 2399 unconstitutional.*—Section 2899 of the Code of 1876, providing that "when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation, or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess," is violative of section 12 of article 14 of the State Constitution, providing that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons," and is void. *Smith v. Louisville & Nashville R. R. Co.*, 449.
  4. *Article 14, section 12, construed.*—This provision of the Constitution must mean that where the cases are alike, the cause of action the same—description of contract or tort, there must be no discrimination between corporations and natural persons, in the matter of prosecuting or defending suits. *Ib.* 449.
  5. *Provision of Art. 4, § 2 of Constitution mandatory; how construed.* The provision of section 2, Art. 4, of the Constitution of this State, ordaining that "each law shall contain but one subject, which shall be clearly expressed in the title," is mandatory; but its requirements are not to be exactly enforced, or in such manner as to cripple legislation. *Ballentyne v. Wickersham*, 533.
  6. *Same.*—Under this clause of the Constitution, the title of a bill may be very general, and need not specify every clause in the statute, it being sufficient if they are all referable and cognate to the subject expressed; and when the subject is expressed in general terms, every thing which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in, and authorized by it. But if clauses are contained in the act which are not so correlated to the subject expressed in the title, as to appear to follow as a natural and legitimate complement, they can not stand. *Ib.* 533.
  7. *Same.*—The constitutional inhibition is as emphatic, that a statute shall not embrace more than one subject, as is the mandate, that that subject shall be clearly expressed in the title; and hence, a statute embracing two subjects, both of which are expressed in the title, falls within the inhibition, and is unconstitutional and void. *Ib.* 533.
  8. *Same; act establishing an Inferior Court of Criminal Jurisdiction for Mobile county, etc., unconstitutional.*—The act approved February 12th, 1879, entitled "An act to establish an Inferior Court of Criminal Jurisdiction for the county of Mobile, and to define the jurisdiction of said court, and the criminal jurisdiction of justices of the peace in said county" (Pamph. Acts, 1878-9, p. 111), expresses in the title, and contains in the body thereof, two subjects, each distinct from and independent of the other, in violation of the constitutional inhibition; and hence, it must be pronounced void, no part of it having been constitutionally enacted. *Ib.* 533.
  9. *Walker v. Griffith*, 60 Ala. 361, doubted.—The argument by which the conclusion was reached in the case of *Walker v. Griffith*, 60 Ala. 361, declared to be unsound, and not to be followed. *Ib.* 533.
  10. *Inferior Criminal Court of Mobile, not established by amendatory act of February 23d, 1881.*—The amendatory act of February 23d, 1881, did not and could not give validity to the original act (act of



CONSTITUTIONAL LAW—*Continued.*

February 12th, 1879), except to the extent it re-enacted the provisions of the older enactment; and, thus interpreted, it is fatally incomplete, and did not establish the "Inferior Criminal Court of Mobile," the name thereby given to the court intended to have been established by the original act. *Ib.* 533.

11. *Elective franchise; nature of.*—The elective franchise is a privilege rather than a right, granted or denied on grounds of public policy, and is the subject of exclusive regulation by the State, limited only by the provisions of the Fifteenth Amendment to the Federal Constitution, which prohibits any discrimination on account of "race, color, or previous condition of servitude." *Washington v. State*, 582.
12. *Same; section 3, art. viii of State Constitution construed.*—Section 3 of article viii of the Constitution of 1875, denying the privilege of registering, voting and holding office to those "who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny," etc., disqualify from participation in the elective franchise all persons convicted of any one of the specified crimes prior to the adoption of the Constitution, as well as those thereafter convicted; and hence, a person convicted of larceny in 1871 may be convicted under the statute for voting at a general election held in August, 1884. *Ib.* 582.
13. *Same; section 3, art. viii of State Constitution neither ex post facto nor in nature of bill of attainder.*—Section 3 of article viii of Constitution, as thus construed, not taking away a legal right, nor imposing a legal burden, and requiring a conviction in the due course of judicial proceedings before disfranchisement, is neither an *ex post facto* law, nor a provision in the nature of a bill of attainder, within the meaning of the Federal Constitution. *Ib.* 582.

CONTEST OF EXEMPTION.

See EXEMPTIONS.

CONTRACTS.

1. *Convicts; when contract for hire of illegal.*—In the absence of action on the part of the commissioners' court, determining in what manner and on what particular works the labor of convicts shall be performed (Code, 1876, §§ 4465, 4468), the judge of probate has no authority to act; and hence, a contract for the hire of a convict made by him, in such case, is illegal and void as against public policy, and no recovery can be had thereon against the hirer. *The State v. Metcalfe*, 42.
2. *Same; contract of sub-hiring.*—A hirer of county convicts, under contract with the commissioners' court, has no authority to sub-let them to another person; and such contract of sub-hiring, being illegal and void, will not support an action. *Arrington v. Morgan*, 606.
3. *Stipulation for forfeiture in contract for sale of land; when waived.* A stipulation in a contract for the sale of land, providing for a forfeiture of the contract if the purchase-money is not paid as it becomes due, and binding the purchaser, in the event of forfeiture, to pay rent, is reserved for the benefit of the vendor, and may be waived by him; and it is waived by his accepting part payment of the first installment of the purchase-money before it is due, and by transferring a part of the installment in payment of a debt. *Lowery v. Peterson*, 109.
4. *Term "advances" construed.*—Plaintiff and defendants entered into a written contract, whereby the former agreed to deliver to the

CONTRACTS—*Continued.*

latter logs at a stated price per thousand feet, and the latter agreed to pay, at the end of each month, for the logs delivered during that month, "after deducting for all *advances*," and commissions thereon at a specified rate. *Held*, that the defendants were not entitled to commissions on disbursements made by them from plaintiff's money, or when they were indebted to him for logs delivered under the contract; nor on an old indebtedness owing by the plaintiff, and incurred prior to the execution of the contract. *Lee v. Byrne & Trammell*, 132.

5. *When parol contract not merged in subsequent written one.*—Where an agent, employed by parol to sell land at a stipulated compensation, afterwards purchases himself, with the understanding that his right to compensation shall not be affected by his becoming the purchaser, and the contract of purchase is reduced to writing, in which nothing is said about compensating him, the prior agreement for compensation is independent of, and distinct from the contract of sale, is not merged therein, and may be established, without infringing the rule excluding parol evidence of antecedent or contemporaneous stipulations which contradict or vary the legal effect of written instruments.—*Huckabee v. Shepherd*, 342.
6. *When to be performed within a reasonable time.*—When a contract does not specify a particular time, or appoint the happening of a particular event for the performance, the presumption is, that the parties intended performance within a reasonable time; and what is a reasonable time, depends materially upon the nature of the duty to be performed, the relation of the parties, and the peculiar circumstances of the particular case.—*Cotton v. Cotton*, 345.
7. *Reasonable time for performance; when a question of law, and when of fact.*—What is a reasonable time for performance, is sometimes a question of fact, and sometimes a question of law. When it depends upon facts extrinsic to the contract, which are matters of dispute, it is a question of fact; but when it depends upon the construction of a contract in writing, or upon undisputed extrinsic facts, it is matter of law. *Ib.* 345.
8. *Contract for sale of lands; what a reasonable time for performance.* Under a contract for the sale of lands, by which the vendor covenanted to convey so soon as he could ascertain the numbers, in the absence of all evidence of intervening impediments, the court inclines to the opinion that six months would be ample time for performance, but adds that, for the purposes of the present case, the court may take two years as a reasonable time, the period allowed to the vendor to obtain title in *Garnett v. Yoe*, 17 Ala. 74. *Ib.* 345.
9. *Same; when bill for specific performance barred.*—When the vendee under executory contract for the sale of lands is not, and has not been within ten years, in possession, and the possession has not been in recognition of his right, the statute barring an action at law to recover damages for a breach of the covenant to convey, upon the expiration of ten years from the breach, applies to a suit in equity by the vendee for a specific performance. *Ib.* 343.
10. *When contract of sale executory, not passing title.*—A contract for the sale of a designated number of bundles of cotton ties, which were never delivered, separated from the bulk, or set apart for the purchaser, or otherwise distinguished or pointed out as the particular bundles sold, is executory, and does not pass the title to the purchaser.—*Fry v. Mobile Savings Bank*, 473.
11. *Executory contract of sale of chattels; right of action against subsequent purchaser.*—The party contracting to purchase, in such case, having no title to the ties, legal or equitable, has no cause of

CONTRACTS—*Continued.*

- action against a subsequent purchaser who has taken possession' *Ib.* 473.
12. *Rescission of executed contract; consideration for.*—A contract which has been executed by one party, only leaving an obligation to pay on the other, can not be rescinded by mutual consent, without other consideration; but its obligation can only be discharged by full payment, release, or accord and satisfaction. *Westmoreland v. Porter*, 452.
13. As to proof of execution of contract attested by subscribing witnesses, see *Meyer Bros. v. Mitchell*, 475.

See AMBIGUITY; CHANCERY; DAMAGES; FRAUDS, STATUTE OF; TELEGRAPH COMPANY.

CORPORATIONS.

1. *Corporator wrongfully amoved or disfranchised; when mandamus lies to restore.*—The writ of mandamus will be awarded against a private corporation, at the instance of one of its members who has been disfranchised or amoved, to compel his restoration to membership, and to the enjoyment of corporate franchises, when the cause of disfranchisement or amotion is in law insufficient, or where the proceedings are irregular, as tested by the charter or by-laws of the corporation; but, in such case, no inquiry can be had into the merits of what has been regularly done, in the due course of proceeding. *Medical & Surgical Society v. Weatherly*, 248.
2. *Penal provisions; how construed.*—The principle, that penal provisions, especially when summary in character, and operative to produce a forfeiture of valuable rights, are to be strictly construed, is as applicable to the by-laws and regulations of voluntary societies, whether incorporated or not, as to constitutional and statutory enactments and municipal ordinances. *Ib.* 248.
3. *Constitution of voluntary association; binding on corporation.*—While the constitution of a voluntary association may be in the nature of a contract between the members, who are bound by its provisions, by reason of express assent in assuming the obligations of membership, such constitution is equally binding upon the society in its corporate capacity. *Ib.* 248.
4. *Same; forfeiture not favored.*—While it may be competent for a member of a voluntary association, incorporated in this State, to bind himself by agreement to forfeit his membership upon a specified condition, and such forfeiture may be made to take effect at a time fixed, without special or personal notice to him, a construction leading to such a result will not ordinarily be adopted by the courts, unless the intention to waive notice may be inferred from uniform custom in the particular business, or is clearly expressed in the most unambiguous and explicit language. *Ib.* 248.
5. *Disfranchisement or amotion of member of voluntary society; nature of power, and how exercised.*—The power to disfranchise a member, or to remove an officer generally resides in the body of every corporate society, is judicial in its nature, and must be exercised by a vote of the society, expressing the corporate will; and, ordinarily, the records or minutes of the body must show that the requisite steps were taken in compliance with the charter and by-laws of the corporation, after reasonable notice to the party charged, either express or implied. *Ib.* 248.
6. *Same; what merely a ground of forfeiture of membership.*—The constitution of a voluntary medical society, incorporated in this State, after providing that every member shall pay into the treasury a



CORPORATIONS—*Continued.*

designated annual contribution, to become due and payable on 1st January of each year, declares that if the contribution is not paid by the first meeting in April thereafter, the defaulter shall *forfeit his membership*, and his name shall be stricken from the roll of members, "and of this he shall be duly notified by the secretary;" and imposes upon the treasurer the duty of serving, on or about 1st March of each year, upon every member in arrears a written notice, calling his attention to the foregoing requirement. It is further declared that "the first regular meeting in April of each year shall be the regular meeting for the revision of the roll of members," at which the treasurer is required to report "the names of all members whose dues for the year have not been paid," and all such names "shall be immediately stricken from the roll," the treasurer being declared "personally responsible to the society for the dues of all defaulting members not so reported;" and by another article relating to the duties and office of treasurer, it is further provided as follows: The treasurer "shall report to the society, at the annual meeting for the revision of the roll, a written statement of the names of members who are in arrears for the dues of the year so that they may be stricken from the roll; and he shall himself be held personally responsible for the dues of all delinquents whom he fails to report; but this written statement shall not be spread upon the minutes." Another article provides in detail for the order of business at what is designated as "the regular meeting for the revision of the roll," specifying, *inter alia*, "the treasurer's report of members in arrears," and the "revision of the roll by the secretary;" and, in another article, it is declared that "any one of these orders of business may be suspended at any time by the vote of a majority of the members present at any meeting." *Held*,

(a) That these several provisions being construed *in pari materia*, as they should be, the non-payment of annual dues by a member, by the first meeting in April, is not, *ipso facto*, a forfeiture of membership, but only a ground of forfeiture, in the nature of a judgment *nisi*, to be made final by the vote of the society.

(b) That, no statement or report having been made by the treasurer at the regular meeting in April, as required by the constitution, and no vote of the society having been taken on the subject, the mere reading, at that meeting, of the name of a member from a book as a delinquent, did not operate a forfeiture of his membership.

(c) That the action of the society at a subsequent meeting, of which such delinquent had no notice, actual or constructive, declaring a forfeiture of his membership for non-payment of dues, was irregular and not binding on him, and, on his application, *mandamus* will lie to vacate it, and restore him to membership. *Ib.* 248.

See CHANCERY, 48-54 ; CONSTITUTIONAL LAW, 3, 4.

## COSTS.

1. *Fees or commissions for services rendered by ministerial officers ; rule regulating.*—For services rendered by ministerial officers, when the law fixes and defines the fees or commissions, the officer shall receive no other or greater compensation than the law declares, although particular circumstances may render such compensation inadequate in the particular case. *Kahn, Wolf & Sons v. Locke*, 332.
2. *Sheriff's fees for collecting money under process ; what service covered by.*—The commissions allowed a sheriff by statute for collecting

## COSTS—Continued.

money on a *fiery facias* include compensation for all the acts of levy and sale required to effect the collection, and are the same whether he receives the money from the defendant on demand, or whether he is put to the trouble of levying and selling, in order to "make the money;" and the rule of commissions in attachment suits is the same, with the exception that a small fee is allowed for making the levy; hence, no extra compensation can be allowed for clerk-hire, or making the return. *Ib.* 332.

3. *Allowance for removal of, and guard over goods levied on; when proper.*—When a stock of merchandise is levied on under an attachment or execution, and it becomes necessary to remove it, and to employ a guard or watchman, for its preservation, these services justify a special, reasonable allowance to the sheriff, to be paid out of the proceeds of sale. *Ib.* 332.

## COURT, PROBATE.

1. *Term of.*—While a term of the probate court may be kept open from day to day, even after the actual business of the term has been disposed of, for the purpose of signing a bill of exceptions, the power of the court to keep open can not, in the nature of things, extend beyond the regular term. *Blake v. Harlan*, 205.
2. *Settlement of administration on decedent's estate; when probate court without jurisdiction.*—Jane R. died leaving her brother, Richard R., one of her heirs at law and distributees. Afterwards he died, and his estate was declared insolvent. At the time of his death, he was a large debtor to the estate of Jane R., and the claim was regularly proved and filed against the insolvent estate. C. is, and for many years has been the administrator of both estates. The settlement of the administration of Jane R.'s estate has been removed into, and is pending in the chancery court. C., as administrator of the insolvent estate of Richard R., having been cited to make a final settlement of his said administration in the probate court, pleaded the facts stated above, as ousting the jurisdiction of that court to make the settlement. *Held*, that neither estate could be completely settled, without taking into the account the settlement of the other, thus requiring the largely flexible powers of a court of equity; and that the powers of the probate court being inadequate to administer just and final relief in the premises, that court was without jurisdiction to make the settlement. *Clark, Adm'r, v. Head, Adm'r*, 373.
3. *Lien of execution issued from probate court; when lost.*—While, under the statute, six months may be permitted to elapse between the issue and return of an execution from the probate court, a new execution must be issued before the lapse of the regular monthly term next succeeding the return term, or the lien of the execution will be lost. *Carlisle v. May*, 502.
4. *Same.*—When an execution issued from the probate court, returnable on the second Monday in December, 1882, was in the hands of the sheriff at the time of the death of the defendant in execution, in September, 1882, but no other execution was issued until 21st April, 1883, four entire terms of the probate court having been thus allowed to elapse without the issue of an execution, this operated a loss of the lien. *Ib.* 502.
5. *Same; lien of equal to that of those issued by other courts.*—The lien of writs of *fiery facias* issued from the probate court is equal to, and not different from that of those issued by common-law courts. *Mathews v. Mobile Mutual Ins. Co.*, 85.
6. As to the jurisdiction of probate court to sell lands for division

COURT, PROBATE—*Continued.*

among joint owners, see *McCorkle v. Rhea*, 213; *Turnipseed v. Fitzpatrick*, 297.

7. As to the jurisdiction of probate court to grant authority to erect mill-dams, see *McAttilley v. Horton*, 491.

See ESTATES OF DECEDENTS.

## CRIMINAL LAW.

1. *Forgery ; when instrument will not support.*—A writing, void on its face because of the want of legal requisites to its validity, is not the subject of an indictment for forgery, in consequence of its incapacity to effect fraud; nor will a writing, so imperfect and obscure that it is unintelligible without reference to extrinsic facts, support an indictment for that offense, unless the facts are averred, and, by the averment, it is made apparent that it has the capacity of effecting fraud. *Hobbs v. State*, 1.
2. *Same ; when instrument will not support.*—An indictment charged the defendant with the forgery of an instrument which, omitting the date, address and signature, is in these words: "Please send me word how long you will give Stephen to pay for the bed, and if you will allow him time enough to pay for it let him have a cheap bureau as cheap as possible and I will see that you will get so and oblige, much, a week. Just write it off the whole thing and send it to me." *Held*, that the instrument was of apparent legal efficacy, and not so imperfect and obscure that, without reference to extrinsic facts, it was unintelligible; that having these qualities, it had the capacity for the perpetration of fraud, and was the subject of forgery; and that it was not necessary to aver in the indictment that the fraud was consummated, the offense being complete by the false making of the writing, without the concurrence of damage or injury. *Ib.* 1.
3. *Forgery ; presumption against one in possession of forged instrument.* One found in the possession of a forged instrument, of which he purports to be the beneficiary, and applying it to his own use, must, in the absence of explanation, be presumed to have forged it, or to have been privy to its forgery. *Ib.* 1.
4. *Same ; when sentence to hard labor proper.*—On a conviction for forgery in the second degree, a term of two years having been fixed upon as the punishment, the court can elect whether it shall be hard labor for the county, or imprisonment in the penitentiary; and if hard labor for the county is imposed, as in this case, it is proper for the court to impose "additional hard labor for the county for a term sufficient to cover all costs and officers' fees," etc. *Ib.* 1.
5. *Betting at games prohibited by section 4207 ; sufficiency of indictment.* Form 29, for an indictment under section 4209 of the Code, contains all the essential parts of an indictment for betting at a gaming table, or a game called keno; but it is not full enough when the charge is, that the accused bet at one or more of the games prohibited by section 4207 of the Code. An indictment under that clause of section 4209, to be sufficient, must aver both the betting, and that one or more of the enumerated games was played, at some one of the places named, by the accused, or by some other person or persons. *Johnson v. State*, 7.
6. *Same.*—An indictment charging that the accused "played at a game with cards at a public house, and did bet or hazard money or bank notes at said game," does not charge two offenses, but charges only the graver offense denounced by section 4209 of the Code. *Ib.* 7.



CRIMINAL LAW—*Continued.*

7. *When charge properly refused.*—Under an indictment for gaming, the evidence only *tending* to prove that the place at which the game was played was a private room, its sufficiency is a question for the jury; and hence, a charge requested by the defendant, which assumes that fact *as proved*, is properly refused. *Ib.* 7.
8. *Gaming; parties charged with knowledge of character of place.*—Parties who play at a game with cards must see to it, that they do not play in one of the places prohibited by the statute; and their want of knowledge of the character of the place is no excuse. Hence, a charge requested by a defendant indicted for betting at a game with cards at a public house, which instructs the jury that “when the evidence shows that the room in which the playing took place was a private room used as a dwelling, it is incumbent on the prosecution to show that the defendant knew, or had reasonable cause to know, that circumstances existed which would make it a public place in the sense of the law,” is properly refused. *Ib.* 7.
9. *Elective franchise; section 3, art. viii of State Constitution construed.* Section 3 of article viii of the Constitution of 1875, denying the privilege of registering, voting and holding office to those “who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny,” etc., disqualify from participation in the elective franchise all persons convicted of any one of the specified crimes prior to the adoption of the Constitution, as well as those thereafter convicted; and hence, a person convicted of larceny in 1871 may be convicted under the statute for voting at a general election held in August, 1884. *Washington v. State*, 582.
10. *Order setting day for trial of capital case; section 4874 of Code, 1876, construed.*—Construing section 4874 of the Code of 1876, the court re-affirms *Floyd v. State*, 55 Ala. 61; *Shelton v. State*, 73 Ala. 5; *Posey v. State*, *Ib.* 490. *Bland v. State*, 574.
11. *Same; when error in recital in judgment-entry of conviction not reversible.*—When the clerk, in attempting, by way of recital, to repeat in the judgment-entry of the trial and conviction of a defendant in a capital case, the order for summoning a jury previously made, fails to copy it correctly, the order first made will be regarded on appeal as the correct and controlling one, and the recital being unnecessary, the error therein will not work a reversal. *Ib.* 574.
12. *When charge as to weight of circumstantial evidence properly refused.* A charge requested by the defendant in a criminal case, instructing the jury that, to authorize a conviction on circumstantial evidence, “the evidence should be as strong as the positive testimony of one creditable witness, who proves beyond all reasonable doubt the guilt of the defendant,” is improper and misleading. *Ib.* 574.
13. *Murder; when refusal to charge as requested free from error.*—Where, on appeal by a defendant indicted for murder, all the evidence is not set out in the bill of exceptions, this court can not say that the primary court erred in refusing a charge requested by the defendant, which instructed the jury, in effect, that unless they were convinced that he was guilty of murder in the first degree, he could not be convicted of any crime; as, under such an indictment, a defendant may be convicted of murder in the first or second degree, or of manslaughter in the first or second degree. *Ib.* 574.
14. *Indictment; signature of solicitor.*—The signature of the solicitor, with a designation of his circuit, is proper, but not essential to the authentication or sufficiency of an indictment; and where, in the absence of the solicitor for the circuit, an attorney is temporarily acting in that capacity, under the appointment of the court, his

## CRIMINAL LAW—Continued.

- signature to an indictment, with the designation of "solicitor pro tem.," is proper. *Holley v. State*, 14.
15. *Murder; admissibility of evidence.*—On the trial of a defendant indicted for murder, the vest worn by the deceased at the time he was killed, and perforated by the shot, may be produced and exhibited to the jury. *Ib.* 14.
  16. *Murder; when charge misleading.*—On the trial of a defendant indicted for murder, a charge requested by him embodying the instruction that he can not be convicted of murder in the first degree, "unless he had murder in his heart," having a tendency to confuse and mislead the jury, is properly refused. *Ib.* 14.
  17. *Same; self-defense.*—To authorize, on the trial of a defendant indicted for murder, instructions touching the law of justifiable homicide, there must be evidence tending to show that there was, in fact, or the circumstances generated a reasonable belief of, the existence of a present, imperious necessity, not resulting from the wrongful act of the defendant, for him to take the life of the deceased, to avoid the loss of his own life, or to avoid grievous bodily harm; and when there is no such evidence, such instructions are abstract, and, for that reason, properly refused. *Ib.* 14.
  18. *Same; when charge on law of self-defense properly refused.*—It is not an honest, but a reasonable belief of a necessity to take life, that will justify a homicide; and hence, a charge requested by a defendant on trial for murder, instructing the jury that if they believe from the evidence, that the defendant, at the time he fired the fatal shot, honestly believed that it was necessary for him to kill the deceased, etc., they must acquit, is properly refused. *Ib.* 14.
  19. *Murder in first degree; meaning of "malicious" as used in statute.* While the term *malicious*, as it is used in the statute defining or describing murder in the first degree, is construed as signifying a killing perpetrated with a fixed hate, or with wicked intentions, or motives, not the result of sudden passion, this fixed hate or wicked intention or motive may be instantaneous, and of it there need have been no previous manifestation. *Ib.* 14.
  20. *Murder; effect of failure to find degree of.*—A verdict in a murder case, finding the defendant "guilty as charged in the indictment, and assessing his punishment to imprisonment for life in the State penitentiary," but failing to find the degree of the homicide, while it presents a reversible error on appeal, will, on *habeas corpus*, support a judgment of conviction. *Dover v. State*, 40.
  21. *Venire in capital case; motion to quash.*—Under the provisions of the statute regulating the drawing and impanelling of grand and petit jurors in the county of Dallas (Pamph. Acts, 1882-3, p. 273; *Ib.* p. 446), the failure of the sheriff to find a person whose name is on the list of jurors drawn by the court, and ordered to be summoned for the trial of a capital case, is no ground for quashing the venire. *McElroy v. State*, 9.
  22. *Confessions; when admissible.*—Confessions made in this case held admissible, although made while the defendant was under arrest for the crime charged, and to the persons making the arrest. *Ib.* 9.
  23. *Charge; when free from error.*—Where, on the trial of a defendant for the murder of his wife, the evidence tended to show that the defendant killed his wife by wantonly striking her with an ax, a charge instructing the jury, that the law presumes that every person intends to do that which he does, and that the defendant must be presumed to have designed, not only what he did, but also the necessary consequence of his act, unless he could show to the contrary, is free from error. *Ib.* 9.

CRIMINAL LAW—*Continued.*

24. *Complaint in county court for larceny; when sufficient.*—A complaint in the county court for petit larceny, which names the offender, and avers the property taken and its ownership, and designates the offense charged with reasonable certainty, by words and phrases which, in common and legal parlance, would be employed to designate it, is sufficient, although it does not contain an averment of the time when the offense was committed; that it was before the complaint was made, being included in averments referring to it as a past matter. *Bell v. State*, 25.
25. *Proof of one offense when accused on trial for another; admissibility of.*—While, as a general rule, it is not permissible, on a trial for one offense, to prove that the accused has committed another and different offense, yet, if the two offenses form parts of the *res gestæ*, the latter is not excluded as extraneous. *Hobbs v. State*, 1.
26. *Re-examination of witness discretionary with primary court.*—Recalling and re-examining a witness in the course of a trial at law, either in a civil or criminal case, is a matter resting in the sound discretion of the primary court, and is not revisable by this court on appeal. *Ib.* 1.
27. *Burden of proof, when death a material issue.*—When a person is shown to have been in life at a particular period of time, and seven years have not passed without intelligence from or concerning him, if the fact of his life or death becomes material, upon the party asserting death the law devolves the burden of proof. *Howard v. State*, 27.
28. *Presumptions of life and of innocence; nature of.*—In criminal cases, the presumption of life may not, under all circumstances, or generally, outweigh the presumption of innocence which the law indulges. Neither presumption is absolute, but both are disputable; and the weight to be attached to each must be determined by the facts of the particular case. *Ib.* 27.
29. *Confession; when sufficient corroboration of the testimony of an accomplice.*—The confession of a defendant indicted for the larceny of a hog, a felony under the statute, that he was present when the hog was killed, and aided in carrying away the carcass, though coupled with a denial of his complicity with the killing, is a sufficient corroboration of the testimony of an accomplice, to authorize a conviction under the statute prohibiting a conviction for a felony on the testimony of an accomplice, "unless corroborated by other evidence tending to connect the defendant with the commission of the offense." *Snoddy v. State*, 23.
30. *Conviction of felony; personal presence at commission of offense, not necessary to.*—Under our statute abolishing the common law distinction between an accessory before the fact and a principal, and between principals in the first and second degrees, in cases of felony, etc. (Code, 1876, § 4802), it is not necessary to the conviction of a defendant indicted, with others, for arson in the first degree, that he should either have himself set fire to the house, or have personally "assisted" any other person in so doing. *Hughes v. State*, 31.
31. *Trial by court without jury; when finding not reviewable by this court.* When a defendant charged with a misdemeanor is tried by the county court of Sumter county, without the intervention of a jury, under the provisions of the statute regulating the trial of misdemeanors in that county (Pamph. Acts, 1882-83, p. 214), the decision of the court upon the facts is equivalent, in legal effect, to the verdict of a jury, and, in the absence of statutory power, can not be reviewed by this court on appeal. *Calloway v. State*, 37.
32. *County Court of Wilcox; trial of misdemeanor without a jury.*—The provision of the general law creating the county court and clothing



CRIMINAL LAW—*Continued.*

- it with jurisdiction of misdemeanors, that if a trial by jury is not demanded, "the judge shall determine both the law and the facts, without the intervention of a jury," etc. (Code, § 4718), applies to the jurisdiction of the county court of Wilcox as enlarged by the special statute of February 23d, 1881 (Pamph. Acts, 1880-1, p. 295). *Bell v. State*, 25.
33. *Alias warrant of arrest; clerk of county court may issue.*—An alias warrant of arrest, not being a judicial act, may be issued by the clerk of the county court. *McLeod v. McLeod*, 483.
34. *Same; when defect in amendable.*—A variance between the original warrant of arrest charging the offense of trespass after warning, which follows the affidavit, and an *alias* subsequently issued, in the christian name of the owner of the lands on which the trespass is charged, is a mere clerical error, which may be corrected by the affidavit and original warrant. *Ib.* 483.
35. *Same; duty of court to issue.*—A warrant of arrest issued on affidavit by the county court having been returned not executed, it is the duty of the court, of its own motion, to issue an *alias*, that the defendant may be brought to trial and the prosecution ended. *Ib.* 483.
36. *Competency of infant as witness.*—That an infant female was incompetent to testify on a former trial of a defendant charged with an attempt to have carnal knowledge of her, and was then so adjudged by the court, does not affect her competency on a subsequent trial of the same case, had after new trial granted. *Kelly v. State*, 21.

See CONSTITUTIONAL LAW, 1, 2; HABEAS CORPUS; SLANDER.

CUSTOM. See USAGE.

## DAMAGES.

1. *Agreement to repair; measure of damages.*—When a landlord stipulates to make repairs, and fails to do so, it is not the duty of the tenant to cause the repairs to be made, limiting his recovery to the expenses thereby incurred; but he has the right to rely upon the landlord's promise to make them, and for a breach of the promise, the landlord is liable for such damages as are the natural and proximate result. *Vandegrift, Adm'r, v. Abbott*, 487.
2. *Breach of executory contract; measure of damages.*—It is a rule of universal acceptance, that damages for the breach of an executory contract, to be recoverable, must be the natural and proximate consequence of the breach, not speculative or contingent; that is, such damages as result in the usual course of things, as distinguished from accidental or collateral injury, or from such as would spring out of special circumstances, not usually attendant upon such transactions. *Daughtery v. Am. Union Tel. Co.*, 168.
3. *Same; extent of recovery can not be tested on demurrer.*—If, in such an action, any thing is recoverable, demurrer is not the way to test the extent of recovery; but this should be done by objections to testimony and by charges. *Ib.* 168.
4. *Measure of; Hadley v. Baxendale, criticised and limited.*—The rule for the assessment of damages recoverable on a breach of contract, laid down in *Hadley v. Baxendale*, 9 Exch. 341, that they are "such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it," criticised and limited. *Ib.* 168.

See ATTACHMENT BOND; COMMON CARRIER; INTEREST; RAILROADS; SHERIFF; TELEGRAPH COMPANY; WATERS.

## DEEDS.

1. *Cancellation of deed to land ; effect of.*—The mere cancellation of a deed to land, without a conveyance, does not operate to reinvest the grantor with the legal title. *Brady v. Huff*, 80.
2. *Adverse possession ; when conveyance thereby rendered void.*—A mortgage of land by the donor to a stranger, during an adverse possession by the donee, who holds under a parol gift, is void, although the donee may know that his title is defective, and the mortgagee has no actual notice of the adverse holding. *Vandiver v. Stickney*, 225.
3. *Adverse possession of land under parol gift ; effect of subsequent possession by donor as donee's tenant.*—The fact that the mortgagor was, in such case, in the temporary occupancy of a portion of the land, at the time of the execution of the mortgage, is immaterial, if he entered after the commencement of the donee's adverse possession, and holds as a mere tenant of the latter, fully recognizing his title as landlord and owner ; the settled doctrine in this State being, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter. *Ib.* 225.
4. *Adverse possession of land ; what necessary to avoid deed executed by party out of possession.*—To avoid a deed to land executed by a party out of possession, on account of the adverse possession of a third party, it is not required that the possession of the latter should have been under a *bona fide* claim of right to the premises, or under the honest belief that his title was good ; it is sufficient if he claimed in independent right, adversely. *Bernstein v. Humes*, 241.
5. *Conveyance by married woman of lands, her statutory estate ; when passes legal title.*—A deed of bargain and sale, absolute on its face, executed by husband and wife as required by the statute, reciting a money consideration, and purporting to convey lands, the statutory separate estate of the wife, in the absence of fraud in the execution of the deed, passes the legal title, and will defeat an action of ejectment by the wife against the vendee, although a portion of the purchase-money may have been paid in the debt of the husband. *Snyder v. Glover*, 379.

See FRAUD, 1 ; CHANCERY ; HUSBAND AND WIFE, 10, 15, 16, 22, 28.

## DEPOSITION.

## DETINUE.

1. *Title to support.*—An equitable title will not support an action of detinue, or the statutory action for the recovery of chattels *in specie*. *Gluck v. Cox*, 310.
2. *When can be maintained on prior possession.*—As against a mere wrongdoer, and those claiming under him, detinue may be maintained on proof of prior possession. *Wortham v. Gurley*, 356.
3. *Time when value of property to be assessed.*—In detinue, the jury may assess the value of the property taken at any time between the wrongful taking and the trial. *Ib.* 356.
4. *Rule for assessment of damages.*—The damages required to be assessed in detinue for the detention of the property, includes any deterioration in the value of the property, occasioned by the fault of the wrongdoer, through neglect, abuse or non-use, during the time of its detention. *Ib.* 356.
5. *Detinue by wife to recover statutory estate ; right of recovery not affected by removal from the State.*—In detinue by a married woman, to recover property belonging to the *corpus* of her statutory separate estate, her right of recovery is not affected by the fact, that, at the time the suit was commenced, she and her husband had

DETINUE—*Continued.*

- removed from, and were non-residents of the State. *Ib.* 356.
6. *When judgment by default erroneous.*—In the statutory action for the recovery of personal property *in specie*, a judgment by default in favor of the plaintiff is erroneous, when the verdict of the jury does not ascertain the alternate value of the property sued for. *Averett & Griffin v. Milner & Wilson*, 505.

## DOMICIL.

1. *Change of ; what constitutes.*—A change of domicile can be accomplished only by a completed act, done with the intention of consummating a removal from the original domicile *animo manendi*; and what state of facts constitutes such change, is a mixed question of law and fact. *Murphy v. Hunt, Miller & Co.*, 438.
2. *Same ; when a question for the court, and when for the jury.*—In cases free from doubt, the court may charge the jury that a change of domicile may be inferred, as matter of law, from a given state of undisputed facts; but when the facts are disputed, or the inferences to be drawn from them are at all doubtful, the question of intention should generally be submitted to the jury as one of fact. *Ib.* 438.

## DOWER.

1. *Jurisdiction of probate court to assign.*—The probate court is without jurisdiction to assign dower in lands, no portion of which lies in the county in which the proceedings are had; and such jurisdiction is not conferred by a special act of the General Assembly, removing the administration of the husband's estate from another county, and clothing the court with jurisdiction to settle and distribute it. *Turnipseed v. Fitzpatrick*, 297.
2. *Character of, before assignment.*—The widow's right of dower, before assignment, is purely equitable, not cognizable at law, and confers on her no specific estate or interest in the lands which she can sell or assign to another; and hence, a purchase of such right is no defense against ejectment brought by the heirs against the purchaser, nor does it entitle him to any reduction of rents. *Ib.* 297.

EASEMENT. See ADVERSE POSSESSION, 8; EJECTMENT, 7.

## EJECTMENT.

1. *Recovery in forcible entry and detainer ; effect of judgment in action of ejectment.*—An action of forcible entry and detainer is strictly possessory, and can only be sustained by proof of prior actual possession, mere constructive possession being insufficient to support it; and hence, a judgment in such action in favor of the plaintiff is, as to the fact of prior actual possession, *res adjudicata*, in a statutory real action in the nature of ejectment, brought by the defendant against the plaintiff in the judgment, or against a purchaser from him, for a recovery of the possession of the premises. *Brady v. Huff*, 80.
2. *Legal title prevails over superior equities.*—Where a purchaser of land, giving his note for unpaid purchase-money, receives a conveyance, takes possession, and then executes a mortgage on the land, the mortgagee can maintain ejectment against a purchaser at a sale made under a decree of a court of equity, rendered on a bill filed to enforce a vendor's lien, by a transferee of the note given for the purchase-money against the purchaser, to which the mortgagee was not made a party. In such case, the legal title, which was in the mortgagee, not being before the court, was not divested;



EJECTMENT—*Continued.*

and it must prevail at law over the defendant's superior equity.  
*Downing v. Blair*, 216.

3. *Rents and improvements on suggestion of adverse possession for three years, when possession under color of title, in good faith.*—The provisions of section 2966 of the Code, limiting a recovery of mesne profits in real actions to damages or rent for one year prior to suit brought, as against a defendant holding possession under color of title, in good faith, do not apply to cases in which the defendant seeks to obtain the benefit of permanent improvements erected on the premises by him, on a suggestion of adverse possession for three years, under sections 2951-4 of the Code; but, in such case, a new equity is created by the statute in favor of both parties, and the defendant is allowed full value for his improvements, and the plaintiff full rent for his land. *Turnipseed v. Fitzpatrick* 297.
4. *Ejectment for recovery of a railroad; when description in complaint not sufficient.*—As the mere survey and location of the line of a railroad, made twenty-five years ago, can not be supposed to have left such visible marks as would enable one to trace it without the aid of the engineer's report and chart, even if it could be done with such aid, such a description in the complaint in an action of ejectment, brought to recover the track or road-bed of the railroad, without more, is too indefinite, and is, therefore, insufficient to authorize a recovery. *Tenn. & Coosa R. R. Co. v. East Ala. Ry. Co.*, 516.
5. *Same.*—Nor is the description, in such complaint, of that part of the right of way lying outside of the graded track sufficient to authorize a recovery thereof, when its dimensions are not given. *Ib.* 516.
6. *Same; when description sufficient.*—Where, however, the averments of the complaint show that the railroad track was not only surveyed and located, but was cleared of timber and graded, with excavations and embankments, and a superstructure, over which locomotives and cars were running, and that it extended from one given point to another, and was the only railroad between those points, the description is sufficient to authorize a recovery. *Ib.* 516.
7. *Will lie for recovery of road-bed and right of way of railroad.*—While, as a general rule, ejectment will not lie for an easement, or to be let into the use or occupation of a servitude, it will lie for the recovery of lands claimed and condemned as the road-bed and right of way of a railroad. *Ib.* 516.
8. *When plaintiff's title can not be disputed.*—Where a defendant in ejectment acquires his possession, and the title he asserts, derivatively from the plaintiff, he can not be heard to dispute the latter's title. *Ib.* 516.

See EXEMPTIONS, 7, 11; HUSBAND AND WIFE, 15, 22.

EMINENT DOMAIN. See CHANCERY, 48-54.

EQUITY. See CHANCERY.

## ERROR AND APPEAL.

1. *Re-examination of witness discretionary with primary court.*—Recalling and re-examining a witness in the course of a trial at law, either in a civil or criminal case, is a matter resting in the sound discretion of the primary court, and is not revisable by this court on appeal. *Hobbs v. State*, 1.
2. *When decision on facts can not be reviewed.*—When parties waive the intervention of a jury, and substitute the court as the trier of the facts, the decision of the court upon the facts is the equivalent of

ERROR AND APPEAL—*Continued.*

- the verdict of a jury, and can not be reviewed on appeal. *Bell v. State*, 25 ; *Calloway v. State*, 37.
3. *When objection to testimony not available on appeal.*—When objection is made to a question propounded to a witness, and is overruled by the court, but the record fails to show that any answer whatever was given to the question, the ruling of the primary court on the objection is not available on appeal. *Hughes v. State*, 31.
  4. *Error not presumed, but must be shown.*—On appeal, error can not be presumed, but must be affirmatively shown ; and hence, an exception reserved to the action of the primary court in overruling a motion to strike an amended complaint from the file, must be disallowed, when the record contains only one count, and it does not appear whether it is the original or an amended complaint. *Lake & Marshall v. Gaines & Co.*, 143.
  5. *Admissibility of evidence ; when error not shown.*—When evidence, on its face irrelevant, is offered, and to its admissibility objection is made, if any connecting facts can be shown, rendering it relevant, the party offering it should inform the court of the manner in which he proposes to connect it so as to show its relevancy ; and if the record, on appeal, fails to show that this was done, an exception to the ruling of the primary court sustaining the objection, will be disallowed. *Ib.* 143.
  6. *Same ; when exception can not be considered.*—Where objection is sustained to offered evidence, partly legal, and partly illegal, and the record fails to show whether the objection was to the whole, or only to a part, and if to a part, what part, an exception to the ruling of the primary court sustaining the objection can not, in this condition of the record, be considered. *Ib.* 143.
  7. *Final decree ; what is, and when appeal barred.*—A decree rendered in a cause made by a bill filed for the final settlement and distribution of a decedent's estate, assuming jurisdiction of the estate, removing the administration from the probate into the chancery court, ordering a reference on the administrator's accounts, and laying down rules by which they should be stated, is final, within the meaning of the statute authorizing appeals to this court ; and hence, assignments of error based on such decree can not be considered on an appeal taken, more than twelve months after its rendition, from another decree rendered in the cause on the coming in of the register's report. *May, Adm'r, v. Green*, 162.
  8. *When decree in vacation, dismissing bill for variance, erroneous.*—It is error for the chancery court to dismiss a bill in vacation, on account of a variance between the allegations and proof, without affording the complainant an opportunity to amend, if there is "any state of evidence which will authorize relief ;" and in determining whether there is such a "state of evidence," it is not necessary or proper to pass upon the weight of the evidence, or to enter upon an examination of the evidence introduced on behalf of the defendant ; but it is sufficient that the evidence for the plaintiff makes out a *prima facie* case, entitling him to relief, the effect of which the defendant must overcome. *Gilmer v. Wallace*, 220.
  9. *Assignment of error when can not be considered.*—The record showing on a defendant's appeal, that the plaintiff demurred to a special plea, assigning nine grounds, and that the court sustained the tenth ground, an assignment of error, that the primary court erred in sustaining the demurrer, can not be considered, the court being unable to know what is covered by the assignment. *Smith v. Freeman & Bynum*, 285.
  10. *When questions not considered on appeal.*—Questions, not jurisdictional, which are made in the primary court, will not be considered on appeal. *Prickett & Maddox v. Sibert, Adm'r*, 315.

ERROR AND APPEAL—*Continued.*

11. *Motion for rents accruing after judgment in real action; effect of appeal from recovery in ejectment, and of supersedeas, where parties are tenants in common.*—Where one tenant in common obtained a judgment of recovery in ejectment against his co-tenant, from which the latter appealed to this court, and executed a bond for the purpose of superseding the judgment, on a motion made by the plaintiff for rents accruing after judgment, on an affirmance in this court, the defendant can not be heard to say, that the bond did not operate as a *supersedeas*, and for this reason, the plaintiff was not prevented from entering by the appeal. The bond, in such case, furnished a sufficient excuse to the plaintiff for not attempting to take possession pending the appeal. *Kirkland v. Trott*, 321.
12. *Charge given and withdrawn; error without injury.*—When a charge, given by the court of its own motion, is withdrawn from the consideration of the jury during the progress of the trial, if it contain error it is error without injury, which will not work a reversal. *Huckabee v. Shepherd*, 342.
13. *Admission of secondary evidence; when error without injury.* Where, on a final settlement of an administration upon a decedent's estate, there is an entire want of evidence to repel the presumption of correctness, in point of fact, of any item embraced in a previous partial settlement, no item embraced in such partial settlement, and protected by such presumption, is re-examinable; and hence, the admission of secondary evidence, in such case, without a proper predicate therefor, of a written contract, in support of an item of credit, allowed on the partial settlement, is error without injury, the evidence being merely redundant and superfluous. *Taylor, Adm'r, v. Bush*, 432.
14. When error can not be regarded as error without injury, see *Rice v. Drennen, Adm'r*, 335.
15. *Correction of clerical error; when § 3154 does not apply.*—If the statute authorizing the correction of certain clerical errors or mistakes within three years after the rendition of final judgment, and inhibiting this court from reversing on appeal, on account of such errors or mistakes, unless the primary court refuses to make the correction (Code, 1876, § 3154), applies to proceedings in the probate court, it has no application, where the error is not shown in the final decree, or in the record proper, but merely in the bill of exceptions, and consists of an improper conclusion drawn from oral testimony; but such error will work a reversal. *Stoutz, Adm'r, v. Rouse*, 431.
16. *Statement of counsel in argument before jury; when a reversible error.* In an action against a railroad company to recover damages for injuries to stock, counsel for the plaintiff, appellee in this court, speaking, in his concluding argument before the jury, of an engineer who was in charge of defendant's train at the time of the injury, and who had been examined as a witness on behalf of the defendant said: "Engineers on railroads, like this engineer, have to emigrate if they do not conform to the wishes of their employers, and testify as their employers' interests require; they testify with a halter around their necks." *Held*, on exception reserved thereto by defendant,
  - (a) That if this had been stated as an inference or opinion, based on the witness' connection with the railroad, and with the act complained of as negligent, counsel would have kept within legitimate bounds.
  - (b) But having been stated as a fact, not as an inference or opinion, and the bill of exceptions, which purports to set out all the evidence, not showing any fact or circumstance in evidence which



ERROR AND APPEAL—*Continued.*

- justified such a line of argument, it should have been ruled out, and the jury cautioned against allowing it to have any influence with them; and the failure of the court to so rule is a reversible error. *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 466.
17. *When rulings in court below will not be reviewed on appeal.*—When a plaintiff, under the uncontroverted facts of the case, can never recover, on appeal by him, this court will not inquire as to the rulings of the primary court rejecting testimony and refusing charges requested by him. *Fry v. Mobile Savings Bank*, 473.
  18. *Presumption in favor of judgment of primary court.*—On appeal, the judgments of primary courts must be presumed to be free from error, until the contrary is shown. *Beadle v. Davidson*, 494.
  19. *Same; when judgment overruling motion to retax costs will not be disturbed.*—Where, on appeal from a judgment of the circuit court overruling a motion made by the plaintiff for a re-taxation of the costs, so as to include the fees of a witness examined on behalf of the plaintiff, whose fees the clerk had omitted to tax against the defendant, the bill of exceptions fails to show how many witnesses were examined on behalf of the plaintiff, and does not repel the conclusion, that many other witnesses were so examined, this court will presume, in favor of the judgment of the circuit court, that the action of that court, in overruling the motion, was based on the fact, that the fees of two other witnesses, testifying to the same fact, had already been allowed. *Ib.* 494.

See CHANCERY, 11, 13, 16.

## ESTATES OF DECEDENTS.

1. *Application for sale of decedent's lands; when plea to good.*—A plea interposed by one of the heirs to an application in the probate court by the administrator of a decedent's estate for an order to sell lands for division, denying all the allegations of the application, is good on demurrer; and a ruling of the court adjudging the plea bad is erroneous. *Rice v. Drennen, Adm'r*, 335.
2. *Same; what can not be regarded as error without injury.*—Such ruling can not be regarded as error without injury, on the ground that the cause was afterwards tried upon its general merits, when it does not appear that the contestant offered any evidence; as this court can not know that he was not deterred therefrom by the erroneous ruling of the primary court. *Ib.* 335.
3. *Same; what no answer to.*—It is no answer to such an application, that the heirs have agreed to dispense with an administration upon the estate, and have undertaken to deal with the lands as their own, even to the extent of creating a trust therein. If the case is one of impertinent or oppressive interference with the equitable rights of the heirs, they must seek relief in equity. *Ib.* 335.
4. *Same; motion to revoke letters not pertinent to.*—To such an application, a motion by the heirs to revoke the letters of administration, is not pertinent; and, on the hearing of the application, such a motion can not be entertained. *Ib.* 335.
5. *Partial settlement of administration upon decedent's estate; presumption of correctness.*—The presumption of correctness attaching, under the statute, to a partial settlement of an administration upon a decedent's estate, prevails only as to matters of fact, and not to pure questions of law, which are open and subject to contestation upon the final settlement, the parties in interest not having appeared and litigated either questions of law or of fact. *Taylor, Adm'r, v. Bush*, 432.
6. *When title to land sold under order of probate court by personal representative not divested,* see *Watson v. Martin, Adm'r*, 506.

ESTATES OF DECEDENTS—*Continued.*

See EXECUTORS AND ADMINISTRATORS, 16-20; EXEMPTIONS; HUSBAND AND WIFE, 1, 5.

ESTOPPEL.

1. *Decree in equity; when not an estoppel.*—A widow having sold, on a credit, without executing title, her dower interest in her deceased husband's land, and the purchaser having also purchased from the decedent's administrator the estate's interest in the entire tract out of which the dower had been assigned, including the reversion in the dower portion, and having died without paying therefor, a bill was filed against his heirs (to which the widow was also made a party defendant), to enforce a vendor's lien for the unpaid purchase-money, setting forth the allotment of dower to the widow, with a description of the land so allotted, the extent of the purchase from the administrator, and that it embraced only the reversion in the dower land, and seeking no relief against the widow. She having made no defense by answer or otherwise, on the hearing a decree was entered, ordering a sale of the entire tract, without mention of the dower claim, or any particular estate in any of the land; and, under this decree, a sale and conveyance were made, purporting to be also of the entire tract. *Held*, that the decree must be referred to the claim set up in the bill, and that the widow is not thereby estopped from asserting her title to the dower land. *Kelly v. Hancock*, 229.
2. *Declarations or admissions; when they operate as estoppels.*—Declarations or admissions, deliberately made, are conclusive upon the party making them, in all controversies involving their truth, between him and the person whose conduct he has knowingly influenced by them; and it is not of importance, whether the declaration or admission is made innocently or fraudulently, or whether, in point of fact, it is true or false; it is the fact, that another has been induced to act on it, and must suffer injury if its truth is gainsaid, that renders it conclusive. *Prickett & Maddox v. Sibert, Adm'r*, 315.
3. *When recitals in note conclusive on maker.*—Where a recital is purposely embodied in a promissory note by the parties, to the effect that the note was given for the purchase-money of a designated tract of land sold and conveyed by the payee to the maker, in order that the payee might thereby be enabled to transfer the note in payment of a debt which he owed, and, on the faith of such recital, the creditor of the payee receives a transfer of the note in payment of his debt, the maker and those claiming the lands under him are thereby estopped from denying that the note was given for the purchase-money of the land. *Ib.* 315.
4. *Tenants in common; res adjudicata.*—On a motion under the statute by the plaintiff in ejectment for rents accruing after judgment, in a case where the parties are tenants in common, the recovery in ejectment is a conclusive adjudication against the defendant, that he had ousted the plaintiff. *Kirkland v. Trott*, 321.
5. *When seller of personal property and those claiming under him estopped from denying title in him at time of sale.*—Where one in possession of personal property represented that, as partner, he owned an undivided half interest therein, and a sale of the property was effected on the faith of such representation, the purchaser parting with value in the belief of its asserted truth,—*held*, in an action of detinue by the purchaser and the owner of the other half interest, against parties claiming under the seller, for a recovery of the property, the possession of which had been forcibly obtained by the seller after the sale, and by him transferred to the defend-

ESTOPPEL—*Continued.*

- ants, that he was estopped from denying that, at the time of the sale, he held the legal title to the interest which he sold; and that this estoppel was binding on the defendants. *Wortham v. Gurley*, 356.
6. *Action to recover penalty for failure to enter satisfaction of mortgage; when mortgagee not estopped from denying satisfaction.*—In an action against a mortgagee to recover the penalty provided by the act of March 1st, 1881, amending sections 2222-23 of the Code of 1876, for failure to enter of record satisfaction of a mortgage (Pamph. Acts, 1880-1, p. 32), the defendant is not estopped from denying that the mortgage had been satisfied, by reason of the fact that he had not, within three months after the request to enter satisfaction, commenced a suit involving that question, and, at the time of the request, no such suit was pending. *Scott v. Field*, 419.
  7. *Same; statute of frauds; when party estopped from pleading it.* Where a party bids in a tract of land at a public sale made by the administrator of a decedent's estate, under a decree of the chancery court, and afterwards, and before complying with the terms of sale, he transfers his bid to another in consideration that the latter will convey to him a portion of the land when he acquires title from the administrator, and to this the administrator assents, reports the sub-purchaser as purchaser, and thereafter, on payment of the purchase-money, conveys the entire tract to him, he is thereby estopped from denying the validity of the sale made by the administrator, or from asserting that it is void under the statute of frauds. *Meyer Bros. v. Mitchell*, 475.
  8. *When defendant in ejectment can not dispute plaintiff's title.*—Where a defendant in ejectment acquires his possession, and the title he asserts, derivatively from the plaintiff, he can not be heard to dispute the latter's title. *Tenn. & Coosa R. R. Co. v. East Ala. Ry. Co.*, 516.
  9. *Possession of vendee under executory contract of purchase; when an estoppel.*—Where a party goes into possession of real estate under an executory contract of purchase, he is estopped from disputing his vendor's title; and, on his being declared a bankrupt, his assignee, standing in his shoes, is equally estopped. *Ib.* 516.

See ATTACHMENT BOND, 11; EJECTMENT, 1; ERROR AND APPEAL, 11; JUDGMENTS AND DECREES, 1.

## EVIDENCE.

## I. ADMISSIBILITY AND RELEVANCY.

1. *Relevancy of evidence as to price and quality of cotton shipped to Liverpool, in action between parties to bill of exchange drawn against shipment, and protested for non-acceptance.*—In an action by the indorsee and purchaser, against the drawer and payee of a foreign bill of exchange, which was drawn against a consignment of cotton shipped from Mobile to Liverpool, and was protested for non-acceptance, evidence as to the quality of the cotton is irrelevant and inadmissible, in the absence of evidence showing that it was sold by plaintiffs in Liverpool as of a quality inferior to that at which it was purchased in Mobile; and if the plaintiffs can be held liable, in such action, for any loss resulting to defendant from their unreasonable delay in selling the cotton in Liverpool after the protest of the bill for non-acceptance, some evidence of such delay and consequent loss must be adduced, before evidence as to the market price of cotton in Liverpool when the cotton arrived there is relevant and admissible. *Martin, Dumee & Co. v. Brown, Shipley & Co.*, 442.



## EVIDENCE—Continued.

2. *Action for malicious prosecution ; when evidence of age of plaintiff inadmissible.*—In an action for a malicious prosecution for the offense of trespass after warning, it is not permissible for the plaintiff to prove that she is a very old person. *McLeod v. McLeod*, 483.
3. *Trespass against sheriff for levying attachment ; admissibility of evidence.*—On the issue of fraud *vel non* in the sale of a stock of goods, in an action of trespass *de bonis asportatis* brought by the purchaser against a sheriff who had levied an attachment on the goods as the property of the vendor, the fact that possession of the goods had been delivered to the plaintiff, and that sales from the stock had been made by his clerk in due course of trade, prior to the levy of the attachment, is relevant evidence for the plaintiff, as tending to show a *bona fide* ownership of the goods ; but an itemized list of the goods sold by the clerk is immaterial, and is properly excluded from the jury. *Shealy & Finn v. Edwards*, 411.
4. *Same ; when attachment proceedings competent for sheriff.*—In such case, the papers and record in the attachment suit, including an order for the sale of the attached goods, and a judgment in favor of the attaching creditor, are competent evidence for the sheriff. While the judgment may not be competent to prove the existence of the debt on which it is based, it is admissible for the purpose of showing that the lien created by the levy of the attachment had been perfected in the manner prescribed by law ; and if the plaintiff desires to limit its effect, he should request an appropriate charge. *Ib.* 411.
5. *Trespass against officer levying process ; knowledge of plaintiff's claim as showing malice.*—Ordinarily, the fact that a sheriff or other ministerial officer, acting under legal process, seizes property with a knowledge that it is not subject to seizure, either because it is the property of a stranger, or because it is exempt by law, is a circumstance indicative of malice, or of that degree of recklessness which is the equivalent of malice ; and, in an action of trespass against him, evidence of the fact is admissible, that the jury may determine whether they will award vindictive, in addition to actual damages. *Alley v. Daniel*, 403.
6. *Same ; when knowledge of plaintiff's claim immaterial.*—But where the officer seizing the property is indemnified, it being his duty to proceed, although he may know that the property is not subject to the process, evidence of such knowledge on his part is irrelevant and inadmissible. In such case, if the officer acts in good faith, and there are no circumstances of aggravation, no facts indicative of a bad motive, nothing more than information that the property is not subject to the process, compensatory damages alone can be recovered. *Ib.* 403.
7. *Same ; evidence of knowledge.*—But in cases where the officer's information or knowledge is material, the practice of introducing *ex parte* affidavits made by the plaintiff and others, and exhibited to the officer prior to the sale, for the purpose of proving such information or knowledge, is questioned. *Ib.* 403.
8. *When acts of party inadmissible for him.*—Where, in an action on a bond or note alleged to have been given for the purchase-money of land, the issue was, whether the purchase of the land was ever in fact consummated, acts of the defendant, done long after the alleged trade, and in the absence of the vendor, inconsistent with the fact of purchase, are not admissible in evidence for him. *Smith v. Freeman & Bynum*, 285.
9. *Testimony of a deceased witness on former trial ; when may be proved.* The testimony of a deceased witness on a former trial, when he was subjected to cross-examination, is admissible on a subsequent

EVIDENCE—*Continued.*

- trial, and may be proved by any competent witness. *Jeffries v. Castleman*, 262.
10. *Evidence ; admissibility of.*—In ejectment by a widow to recover a portion of the decedent's lands which had been assigned to her as dower, and which, by parol contract, she had sold, but had never conveyed, it being a disputed question, under the plea of the statute of limitations, whether she had been fully paid for the lands so sold by her, the fact that she did not file a claim for any part of the purchase-money against the insolvent estate of the deceased purchaser, is admissible in evidence against her, as a circumstance, to be weighed by the jury, with the other testimony, in determining whether any part of the purchase-money remained unpaid. *Kelly v. Hancock*, 229.
  11. *Action against sheriff for failing to make money on execution ; admissibility of evidence for him.*—A sheriff, in an action against him for failing to make the money on execution, may testify as a witness for himself, that he made diligent search for the property belonging to the defendant in execution, and found none ; but he can not testify that he returned several executions against such defendant "no property found," unless he first lays a proper predicate for the introduction of secondary evidence of the existence and contents of the executions. *Abbott, Downing & Co. v. Gillespy*, 180.
  12. *Same ; proof of insolvency.*—The insolvency of the defendant in execution, in such case, can not be testified to as a collective fact, it being a legal conclusion deducible from facts and circumstances in evidence ; but it may be shown by evidence of the issue of executions on other judgments against the defendant in execution, and of the returns thereon of "no property found." *Ib.* 180.
  13. *Same ; what no defense.*—It is no defense to an action against a sheriff for failing to make the money on execution, that he declined to levy on property in the possession of the execution debtor, because he honestly believed that it was exempt ; and hence, evidence of that fact is inadmissible for him. *Ib.* 180.
  14. *Same ; when claim of exemption admissible for sheriff.*—In such action, a claim of exemption, properly verified and filed in office of probate judge after the issue of the execution, but before any levy is made, by the defendant in execution, covering all the property found in his possession, is competent evidence for the defendant ; as such claim is made by statute *prima facie* evidence of its correctness as against the debtor's creditors. *Ib.* 180.
  15. *Action on attachment bond ; when evidence of agent's malice inadmissible.*—In a suit on an attachment bond, whether against the principle or surety, the unauthorized malice or vexation of the agent not being a ground of recovery, evidence of it should not be allowed to go to the jury. *Jackson v. Smith*, 97.
  16. *Same ; what evidence inadmissible.*—In an action on an attachment bond, it is not competent for the plaintiff to testify that the effect of the attachment on him was to prevent him from making a crop, and from doing any business, and that it ruined him ; or to prove that he was a man of limited means. *Ib.* 97.
  17. *Same.*—It was further held that the primary court erred in allowing proof to be made in this case by the plaintiff, (1) when and how he obtained money which he placed on deposit with his surety on a replevy bond executed by him in the attachment suit, the fact of such deposit not having been proved against him ; (2) how he had lived after the attachment was levied, it not being in rebuttal to any thing proved against him ; and (3) that the plaintiff said to witnesses that he was not going to Texas, when it is not shown to have been a part of the *res-gesta*. *Ib.* 97.

EVIDENCE—Continued.

18. *Admissibility of evidence.*—On a motion for rents accruing after judgment in a real action under the statute (Code, § 2958), the bond and other proceedings on an appeal taken by the defendant in the real action are admissible in evidence for the plaintiff, although they are not averred in the motion, or otherwise pleaded. *Kirkland v. Trott*, 321.

See ATTACHMENT BOND, 10; FRAUDULENT CONVEYANCES; WITNESSES.

II. ADMISSIONS; DECLARATIONS; HEARSAY; RES GESTÆ.

19. *Proof of agency; acts and declarations of agent.*—The general rule is, that the fact of agency must be proved, before the acts, declarations or admissions of the agent can be received as evidence against the principal; but, where the fact of the agency rests in parol, or is to be inferred from the conduct of the principal, if there is any evidence tending to show the agency, the acts or declarations of the agent are admissible as evidence, and the jury must determine the question of agency *vel non*. *Martin, Dumez & Co. v. Brown, Shipley & Co.*, 442.
20. *Admissions of one partner after dissolution against the other; when incompetent.*—The admissions of one partner, made after a dissolution of the partnership, and after he had transferred his interest to his copartner, are not admissible in evidence against the latter, in a suit between him and a debtor of the partnership. *Jeffries v. Castleman*, 262.
21. *Declarations of vendor; when not admissible against vendee.*—The declarations or admissions of a vendor, made prior to the sale, and not connected with it, in the absence, and without the knowledge of the vendee, are not admissible against the latter for the purpose of destroying his title, or of involving him in fraud. *Murphy v. Butler, Pitkin & Co.*, 381.
22. *When testimony not hearsay.*—When an exchange of personal property is made by an agent for his principal, the report of the transaction by the agent to the principal for ratification is part of the *res gesta*, in a suit involving the title to the property received by the agent in the exchange. *Meyer v. Hearst*, 390.

See *supra*, 8, 10, 17.

See FRAUDULENT CONVEYANCES.

III. BURDEN OF PROOF; WEIGHT AND SUFFICIENCY.

23. *Burden of proof, when death a material issue.*—When a person is shown to have been in life at a particular period of time, and seven years have not passed without intelligence from or concerning him, if the fact of his life or death becomes material, upon the party asserting death the law devolves the burden of proof. *Howard State*, 27.
24. *Presumptions of life and of innocence; nature of.*—In criminal cases, the presumption of life may not, under all circumstances, or generally, outweigh the presumption of innocence which the law indulges. Neither presumption is absolute, both are disputable; and the weight to be attached to each must be determined by the facts of the particular case. *Ib.* 27.
25. *Same; proof fraud.*—When a voluntary conveyance is attacked for actual fraud by a subsequent creditor of the grantor, the general rule applies, that fraud will not be presumed, but must be proved; and the burden of its proof is on the complainant; but the rule



EVIDENCE—*Continued.*

does not require that the fraud must be proved by direct and positive evidence; it may be shown by circumstances leading to a rational, well founded conviction of its existence. *Seals v. Robinson & Co.*, 363.

26. *Badge of fraud; burden of proof, when not shifted.*—It can not be asserted, as a general rule, that every badge of fraud, casting suspicion on the good faith of a transaction, shifts the burden of proof upon the party claiming under it, so as to require him to explain it; and that, in the absence of explanation, such transaction is to be necessarily pronounced fraudulent. *Shealy & Finn v. Edwards*, 411.
27. *Bona fide purchase; proof of.*—The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment, it being affirmative defensive matter, in the nature of confession and avoidance; but this done, he need not go further, and prove that he made such purchase and payment without notice. The burden here shifts, and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof that before the payment the purchaser had actual or constructive notice of the equity or lien asserted, or of some fact or circumstance which was sufficient to put him on inquiry, and which, if followed up, would have discovered the equity or incumbrance. *Barton v. Barton*, 400.

See COMMON CARRIER, 7, 9-12, 22.

## IV. OBJECTIONS.

28. *When evidence properly excluded.*—When evidence is offered as a whole, parts of which are inadmissible, the primary court may, without error, exclude the whole. *Warren v. Wagner*, 188.
29. *Motion to exclude; when may be made.*—A motion to exclude evidence which is not merely secondary, but is in itself illegal or irrelevant, may be entertained at any stage of the cause prior to the retirement of the jury. *Ib.* 188.

See CHANCERY, 72; ERROR AND APPEAL, 3-6.

## V. PAROL AND WRITTEN.

30. *Contract partly in writing and partly in parol; admissibility of parol evidence.*—If a statute does not intervene, contracts may be expressed partly in writing, and partly in parol; and if the writing does not purport to set out the entire contract, but only the part thereof which is obligatory on the party making it, parol evidence is admissible to establish a distinct and separable part of the contract, obligatory on the other party, but not reduced to writing. (*Evans v. Bell*, 20 Ala. 509, overruled on this point.) *Vandegrift, Adm'r, v. Abbott*, 487.
31. *Same.*—Hence, where only the promise of a tenant to pay rent is reduced to writing, parol evidence is admissible to establish a distinct and separable contract on the part of the landlord to repair, made contemporaneously with the writing. *Ib.* 487.
32. *When parol contract not merged in subsequent written one.*—Where an agent, employed by parol to sell land at a stipulated compensation, afterwards purchases himself, with the understanding that his right to compensation shall not be affected by his becoming the purchaser, and the contract of purchase is reduced to writing, in which nothing is said about compensating him, the prior agreement for compensation is independent of, and distinct from the contract of sale, is not merged therein, and may be established,

EVIDENCE—*Continued*.

without infringing the rule excluding parol evidence of antecedent or contemporaneous stipulations which contradict or vary the legal effect of written instruments.—*Huckabee v. Shepherd*, 342.

See AMBIGUITY; AMENDMENT, 10.

## VI. PRIMARY AND SECONDARY.

33. *Secondary evidence of writings beyond jurisdiction of court*.—When original letters or documents are in a foreign country, beyond the jurisdiction of the court, secondary evidence of their contents is admissible, although the witness has the original in his possession. *Martin, Dunce & Co. v. Brown, Shipley & Co.*, 442.

See ERROR AND APPEAL, 13.

## VII. RECORDS; ANCIENT DOCUMENTS.

34. *Admissibility in evidence of ancient documents*.—Under the facts of this case, a statutory real action in the nature of ejectment, it was held that the ruling of the primary court, in allowing the plaintiff, in support of his title, to read in evidence a duly certified transcript from the receiver's journal, a book belonging to the United States land office, showing that a party under whom the plaintiff claimed, had purchased the land in controversy in 1809, was free from error. *Bernstein v. Humes*, 241.
35. *Same*.—Nor did the primary court err in allowing the plaintiff to read in evidence transcripts of the records of deeds in the office of the judge of probate, executed in 1818 and 1833, under which the plaintiff claimed, although the deeds may not have been properly acknowledged, and not recorded within the time prescribed by the statute. *Ib.* 241.
36. *Record of deed; when admissible in evidence*.—Held, that the primary court did not err in admitting in evidence, in this case, a record of a deed to lands, which had been duly recorded, on proof that the original was not in the custody or under the control of the party offering it. *Huckabee v. Shepherd*, 342.

## VIII. VARIANCE.

37. *When averment in complaint mere descriptio personæ*.—Where, in an action against a judge of probate for issuing a marriage license to a minor, etc., under section 2681, as it originally stood, the complainant describes the minor to whom the license was issued by her name, and the further designation, that she is the plaintiff's daughter, the latter words are merely *descriptio personæ*, which it is not necessary to prove, the original statute authorizing a recovery of the penalty by any person who elected to sue for it. *Roberts v. Pippen*, 103.
38. *Action against railroad company for personal injuries; variance*.—Where, in an action by a passenger against a railroad company, to recover damages for personal injuries, the complaint alleges that the plaintiff "was compelled and forced by the agents of said defendant to get off defendant's train while in motion, and before said train had reached the usual place at the depot," and that injuries sustained by him were produced by the negligence of defendant's agents, "in compelling and forcing" him to get off the train, the gravamen of the action is the alleged force, and is not sustained by evidence merely, that when the train was approaching the platform at the depot, the conductor came towards him in the car, crying out the name of the station, and saying, "We

## EVIDENCE—Continued.

have got no time, hurry up," and that this was repeated by the conductor several times while the plaintiff was making his egress from the car, and before he stepped from the moving train; such words not being susceptible of a construction which would impute to the conductor any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it. *South & North Ala. R. R. Co. v. Schaufler*, 136.

39. *When fatal to relief.*—If redundant allegations are introduced into pleadings, and they are descriptive of that which is material, a variance between the allegations and proof is fatal, of the same consequence as a variance between the allegation of an essential fact, and the proof of that fact. *Gilmer v. Wallace*, 220.
40. *What a fatal variance between allegation and proof of contract.* Where, in an action by a passenger against a corporation operating an intermediate line of railroad, for damages for the failure to deliver baggage, the contract is alleged to have been made with the defendant for the transportation of the baggage to a designated point, which is situate on the last connecting line, to be there delivered to the plaintiff, and the proof shows that the contract was made with the company operating the first connecting line, and is an agreement on the part of the defendant for the transportation and delivery of the baggage, not to the plaintiff at the point of destination, but to the company operating the last connecting line, there is a variance between the allegations and proof, which is fatal to the right of recovery. *Montgomery & Eufaula Ry. Co. v. Culver*, 587.

See CHANCERY, 85, 86.

## EXECUTION.

1. *From probate court; lien of.*—The lien of executions issued from the probate court is equal to, and not different from that of those issued by common-law courts. *Mathews v. Mobile Mutual Ins. Co.*, 85.
2. *Lien of execution; extent of.*—The lien of an execution operates upon and binds, not only the property subject to its mandate, which is in the possession of the defendant, or the title to which stands in his name, but also property, with the title to which he has parted for the purpose of hindering, delaying and defrauding his creditors, unless it has been conveyed by the grantee having possession to a bona fide purchaser for a valuable consideration, and without notice. *Ib.* 85.
3. *Same; when not lost.*—The lien of an execution, so long as it is kept alive, can not be defeated or impaired by the activity of creditors acquiring a junior lien; nor is it lost by mere passiveness, by mere neglect to force a levy and sale; but there must be culpable laches or fraud on the part of the creditor to work its loss. *Ib.* 85.
4. *Judgment rendered and execution issued after defendant's death; validity of.*—A judgment rendered against a party after his death is a nullity; and an execution issued on a valid judgment, after the defendant's death, is void, unless the judgment supporting it has been revived, or it is issued in order to continue a lien already acquired by previous execution. *Meyer v. Hearst*, 390.
5. *Sale under void process also void.*—A sale of property under void process is also void, and confers no title on the purchaser. *Ib.* 390.
6. *Lien of execution issued from probate court; when lost.*—While, under the statute, six months may be permitted to elapse between the issue and return of an execution from the probate court, a new execution must be issued before the lapse of the regular monthly



EXECUTION—*Continued.*

term next succeeding the return term, or the lien of the execution will be lost. *Carlisle v. May*, 502.

7. *Same.*—When an execution issued from the probate court, returnable on the second Monday in December, 1882, was in the hands of the sheriff at the time of the death of the defendant in execution, in September, 1882, but no other execution was issued until 21st April, 1883, four entire terms of the probate court having been thus allowed to elapse without the issue of an execution, this operated a loss of the lien. *Ib.* 502.
8. *Lien of execution ; when continuity of not broken.*—When executions have been regularly issued on a judgment, without the lapse of an entire term, the continuity of the lien is not broken by the fact that an execution issued on the judgment, which was so irregular, informal and imperfect that it would have been quashed on motion, was returned by the order of the plaintiff, and, on the same day, another execution, curing the defects of the first, was issued. *Clark v. Spencer*, 49.

See CHANCERY, 40–42; SHERIFF.

## EXECUTORS AND ADMINISTRATORS.

1. *Liability of administrator for interest.*—An administrator who, without sufficient excuse, postpones making a final settlement and distribution of the estate for an unreasonable period of time, is liable for interest on funds in his hands belonging to the estate, which he ought to have distributed, although he makes the exculpatory affidavit authorized by the statute (Code, 1876, § 2520). *May, Adm'r, v. Green*, 162.
2. *Commissions on collections and disbursements made by administrator in Confederate money ; how estimated.*—An administrator is not entitled to full commissions in good currency on collections and disbursements made by him, during the late war, in Confederate money ; but an equitable and just value of the usual commissions, reduced from a basis of Confederate currency to that of the present lawful currency, is all that he can demand. *Ib.* 162.
3. *Personal liability of administrator for purchase-money of lands sold by him.*—When an administrator fails to take sufficient sureties on a note for the purchase-money of land sold by him, or becomes himself surety for the purchaser, he is liable individually for the debt, and can not obtain a credit on his final settlement for attorney's fees and costs incurred and paid by him in collecting the debt from the purchaser. *Ib.* 162.
4. *Extra compensation to administrator ; services should be itemized.* To entitle an administrator to compensation for special or extraordinary services, proof should be made of each special service, and of its particular value ; “ the whole should not be aggregated by mere estimate, without being itemized.” *Ib.* 162.
5. *Decree against administrator and sureties in favor of his wife, erroneous.*—The husband, as the wife's trustee under the statute, is authorized to receive her distributive share in a decedent's estate ; and hence, the husband being administrator of an estate of which the wife is one of the distributees, a decree against him and his sureties in her favor for her distributive share, on a final settlement of the estate in a court of equity, is erroneous. *Ib.* 162.
6. *Cultivation by administrator of crops planted by intestate ; credit for expenditures.*—Where an intestate, at the time of his death, had planted, and was engaged in cultivating crops, it is the duty of the administrator, under the statute, to continue the cultivation of the crops, and to gather and prepare them for market ; and for his just

EXECUTORS AND ADMINISTRATORS—*Continued.*

and reasonable expenditures in the performance of this duty, he is entitled to credit on settlement (the want of good faith, of prudence, or of diligence, not being imputable to him), although, on account of natural causes, destructive of crops in that section, such expenditures largely exceed the proceeds of the sales of the crops. *Taylor, Adm'r, v. Bush, 432.*

7. *Rent of decedent's land ; when contract for repairs binding on administrator.*—An administrator having, under the statute, the power to rent the lands of his intestate, the power and the duty to rent resulting therefrom authorize him to make such repairs as are necessary to render the lands tenantable; and if, even in the absence of such power, an administrator should stipulate with the tenant for making repairs, he could not avoid the stipulation, and whoever claimed its enforcement would take it *cum onere*. *Vandegrift, Adm'r, v. Abbott, 487.*
8. *Homestead to widow and minor children ; by whom return made under § 2841 of Code.*—The duty of making the report or return of homestead or other exemption claimed by the widow or guardian of minor children, etc., as provided by section 2841 of the Code of 1876, when the claim or selection has been made without the intervention of commissioners, rests on the personal representative, although the statute is silent as to the person by whom the report or return should be made. *Jarrell, Ex'r, v. Payne, 577.*
9. *Same ; negligence of personal representative to report ; liability for.* The failure of the personal representative to make such report, as required by the statute, fixes on him a *prima facie* liability for negligence, and casts on him the burden of exculpation; and the measure of his liability, the estate having been declared insolvent, is the injury resulting to the creditors of the estate from such failure. *Ib. 577.*
10. *Same ; when personal representative not liable for rents of homestead.* In such case, the personal representative fully exonerates himself from liability, by showing that the homestead did not exceed, in quantity, eighty acres, or, in value, one thousand dollars, and that it had been occupied, since the decedent's death, by the widow under an asserted claim of homestead on behalf of herself and minor child, to which he had assented; and hence, on proof of these facts on final settlement made by him after declaration of insolvency, he is not chargeable with the rent of the homestead. *Ib. 577.*

See ESTATES OF DECEDENTS ; HUSBAND AND WIFE, 1, 5.

## EXEMPTIONS.

1. *Contest of exemptions ; by what law governed.*—Although the statute, after making express provision for determining the question of exemption against debts contracted prior to the adoption of the Constitution of 1868, and against debts contracted since April 23rd, 1873, fails to make any provision for determining such question as to debts contracted between those dates, harmony of proceedings requires that the courts should treat this as an accidental legislative oversight, and that, since the approval of the act of February 9th, 1877, the same mode, method and remedy should be observed in all cases of asserted homestead and other exemptions. *Clark v. Spencer, 49.*
2. *Claim of exemption under sections 2828–29 of the Code ; how made.* Where the claimant of an exemption seeks to conform to sections 2828 and 2829 of the Code of 1876, he should be governed, in the quantity and value of property he selects, by the date of the debts,

EXEMPTIONS—*Continued.*

- against which he claims exemption; and if he owes debts falling within more than one of the classes recognized by the statute, he should, in his declaration and claim, specify what property he selects under each one of the classes. *Ib. 49.*
3. *Same; when claim not void, though insufficient as against debt sought to be collected.*—A declaration claiming a tract of land in the country, containing *eighty-eight* acres, of less value than \$2000, as a homestead exemption, made and filed in the office of the judge of probate in due form, and in conformity to the provisions of section 2828 of the Code, being valid as against debts contracted after April 23rd, 1873, is not void, although it is insufficient as against debts contracted prior to that date, and after the adoption of the Constitution of 1868, in that it does not select and designate which *eighty of the eighty-eight* acres are claimed. *Ib. 49.*
  4. *Same; should be contested, though insufficient as against debt sought to be collected.*—The declaration of exemption in such case not being void, although insufficient as against debts contracted after the adoption of the Constitution of 1868, and before the 23rd April, 1873, before an execution issued for the collection of a debt of that class is levied on the property claimed, the plaintiff should contest the claim as provided in section 2830 of the Code of 1876; and a levy and sale made without such contest are irregular, and the levy may be quashed and the sale arrested or set aside, on timely application properly made. *Ib. 49.*
  5. *Claim of homestead exemption under section 2834; when should be allowed though defendant has conveyed the property.*—The defendant in execution having, in addition to such declaration, also lodged with the sheriff, after levy and before sale, a declaration under section 2834 of the Code of 1876, setting forth that, at the time of the rendition of the judgment, he owned and occupied as a residence the *eighty-eight* acres of land levied on, and continued to occupy them as a homestead until a designated time after the lien had attached, when he sold and conveyed them, and the purchaser had ever since owned and occupied them as a residence, and that the said land was worth less than \$2000, and, as vendor of the purchaser, he claimed the land as exempt from levy and sale under execution; and to this claim the purchaser having appended an affidavit, also claiming the land as exempt under the defendant's claim of exemption, and adding a description of *eighty* acres of the land which he selected in the event he was entitled to only *eighty* acres, it was further held, that this claim of exemption should have been allowed to prevail, if not successfully controverted; and that, the sheriff having disregarded it, and sold the land without a contest, the sale was irregular. *Ib. 49.*
  6. *Sale of homestead under execution after claim filed; when irregularities in, no defense to an action of ejectment.*—The levy and sale made under the execution, while irregular, are not void, nor can they be collaterally impeached; and hence, such irregularities constitute no defense to an action of ejectment by the purchaser, claiming under a conveyance made in pursuance of the levy and sale, the sale and conveyance not having been set aside. *Ib. 49.*
  7. *Homestead exemption; by what law governed.*—As against a debt contracted in February, 1873, the extent and value of a homestead exemption must be determined by the Constitution of 1868. *De Graffenreid v. Clark, 425.*
  8. *Same; consequence of.*—Where the area of the homestead is within the limits prescribed by law, a conveyance of it without the voluntary signature and assent of the wife is void; but where the conveyance is of a larger tract, including the homestead, which has not been selected and set apart, the conveyance is valid as to the



EXEMPTIONS—*Continued.*

- excess over and above the quantity to which the owner is entitled by way of exemption. *Ib.* 425.
9. *Same.*—In such case, the legal title to the whole passes to the grantee, with the reserved power in the grantor to withdraw the exempted portion from the operation of the conveyance, by some proper act of selection, by which it is separated from the other. *Ib.* 425.
  10. *Same; when claimant not injured by verdict.*—Where, in ejectment for one hundred and sixty acres of land, lying in two sections, eighty in each, and both contiguous, the plaintiff claims under a mortgage executed by the defendant, a married man, in February, 1873, without the signature and assent of his wife, to secure a debt then contracted, and the defense is, that, the whole tract being exempt to the defendant as a homestead, the mortgage is void, and the defendant refuses to select a smaller quantity as his homestead exemption, he can not complain of the verdict of the jury allowing him, as exempt, the eighty acres on which are his dwelling and appurtenances, the question having been fairly submitted to the jury as to what particular eighty acres were occupied by him as a homestead. *Ib.* 425.
  11. *Right of homestead exemption; how determined.*—The right to a homestead exemption must be determined by the facts existing at the time the lien under process attaches; and hence, if the debtor be a non-resident at that time, his subsequent removal to the State does not entitle him to a homestead exemption as against such lien. *Murphy v. Hunt, Miller & Co., 438.*
  12. *Right of homestead exemption; when lost.*—A debtor loses his right of exemption of his homestead from levy and sale under process, by leaving and quitting the premises, and placing a tenant in possession, without having filed his written declaration and claim for record in the office of the judge of probate, in accordance with the requirements of section 2843 of the Code of 1876. *Ib.* 438.
  13. *Same.*—The mere lodging of his claim, in such case, with the sheriff after the levy of process, under the provisions of section 2834 of the Code of 1876, will not entitle him to an exemption of the premises from levy and sale under the process. *Ib.* 438.
  14. *Mortgage of homestead; jurisdiction of court of equity.*—A court of equity will assume jurisdiction to reform a mortgage of a homestead belonging to a married man, and executed and acknowledged by him and his wife in strict conformity with the statute, by correcting the description of the conveyed premises, where the premises are described in the mortgage as containing a stated number of acres, and including the family residence, stables and other improvements, and the desired reformation does not seek to increase the quantity of the lands conveyed, or to locate them in a different section, but merely to correct an admitted error in the designation of the subdivisions of the same section. *Gardner & Gates v. Moore, 394.*
  15. *Homestead to widow and minor children; by whom return made under § 2841, of Code.*—The duty of making the report or return of homestead or other exemption claimed by the widow or guardian of minor children, etc., as provided by section 2841 of the Code of 1876, when the claim or selection has been made without the intervention of commissioners, rests on the personal representative, although the statute is silent as to the person by whom the report or return should be made. *Jarrell, Ex'r, v. Payne, 577.*
  16. *Same; when selection necessary.*—Although there is no express direction or provision in the statute for selecting the homestead by or for the widow or minor children of a decedent, when the family resided thereon at the time of the decedent's death, yet, such

EXEMPTIONS—*Continued.*

- selection must be made, when the tract consists of more acres, or is of greater value than can be claimed as exempt. *Ib.* 577.
17. *Same; when selection necessary.*—But when, as in this case, the whole tract does not exceed the quantity and value the law exempts in favor of the widow or minor children, no selection is necessary; but all that is required in such case is, that the claim should be asserted or made known before the personal representative acquires dominion over it for the purposes of administration, or some creditor procures its sale for the payment of debts. *Ib.* 577.
  18. *Same; should be reported under § 2841 of the Code, though not laid off by commissioners.*—Under section 2841 of the Code of 1876, the homestead or other exemption in favor of the widow or minor children should be reported to the probate court, within sixty days after it is claimed, although commissioners were not appointed to lay it off. (*Farley v. Riordon*, 72 Ala. 128, on this point, qualified.) *Ib.* 577.
  19. *Allotment of homestead to widow and children of decedent under § 2061 Rev. Code; when fatally defective.*—Proceedings had in the probate court for the allotment of a homestead to the widow and children of a decedent, under subdivision 6 of section 2061 of Revised Code, authorizing the appointment of three appraisers to lay off and set apart five hundred dollars worth of land, etc., are fatally incomplete, when it is not shown by the record that any report was made by the appraisers, or, if made, was ever, in any form, judicially passed on by the court. *Turnipseed v. Fitzpatrick*, 297.
  20. *Contest of exemption; right of amendment; mandamus.*—A plaintiff in attachment having contested a claim of exemption made by the defendant to personal property levied on, and the defendant not executing a bond under sections 2836 and 2942 of the Code, on the plaintiff executing bond, approved by the sheriff, the property was delivered to him, and by him placed in the hands of his attorneys, who still hold it, or its proceeds. The bond having been quashed on motion of defendant, based on the ground that it was defective, the plaintiff moved for leave to file a new and sufficient bond. The court overruled this motion, and ordered that the defendant be allowed five days in which to give bond and take possession of the property, and, on his failure to do so, that the plaintiff be allowed five days within which to give bond; and that the plaintiff's attorneys pay and turn over to the clerk of the court the money and property in their hands, to abide the further orders of the court, to be made in the premises. *Held*,  
 (a) That the defendant, in his motion to quash plaintiff's bond, having failed to assign as a ground therefor, that he had not been allowed, in the first instance, the five days allowed by statute in which to give bond and take possession of the property, the presumption is, under the facts in the case, that the time was allowed him, and that he failed to give the bond.  
 (b) That the court should have allowed the plaintiff to give a new and sufficient bond; and that it erred in allowing defendant five days in which to give bond, and in ordering the plaintiff's attorneys to pay and turn over to the clerk the money and property in their hands.  
 (c) *Mandamus* ordered by this court, commanding the primary court to vacate and set aside the order made by it, and to make an order allowing the plaintiff to file an amended bond under sections 2836 and 2943 of the Code of 1876. *Ex parte Haralson & Co.*, 543.
  21. *Exemption of personal property when debtor owns less than \$1000 worth; no selection required.*—While the law casts upon a debtor

EXEMPTIONS—*Continued.*

- owning personal property exceeding one thousand dollars in value, the duty of selecting that which he will retain as exempt from levy and sale under legal process for the payment of debts, if he has not personal property exceeding in value one thousand dollars, a selection is unnecessary, the law, without the doing of any act on his part, intervening and attaching the right of exemption as absolutely and unconditionally as if the particular property was specially designated and declared exempt. *Alley v. Daniel*, 403.
22. *Same*; sale of can not be impeached as fraudulent.—A sale or other disposition of property which is by law exempt from the payment of debts, can not be impeached by creditors as fraudulent; and hence, where a debtor, whose personal property is of less value than one thousand dollars, makes a sale of all of it, the sale can not be impeached for fraud, although it was made for the purpose of hindering, delaying and defrauding his creditors. *Ib.* 403.
  23. *Right to an exemption of personal property; when not waived.*—While an exemption of property from levy and sale for the payment of debts is a personal privilege, which the debtor may waive, or may lose by the failure to claim it before a sale under legal process, of which he is informed, the right is not waived or lost by a mere failure to make or file a claim or declaration of claim before there is a levy of the process. *Ib.* 403.
  24. *Same*; failure to levy on exempt property.—While the statute does not make it the absolute and imperative duty of a sheriff to levy upon exempt property, where the debtor has failed to file his declaration and claim in the office of the probate judge, it is the safer policy for him to make the levy, thereby enabling the creditor to contest the claim of exemption under the provisions of the statute, as, on his failure or refusal to levy upon such property, when shown to have been in the debtor's possession, he assumes the burden of proving that it was in fact exempt. *Abbott, Downing & Co. v. Gillespy*, 180.
  25. *Action against sheriff for failure to make money on execution; belief as to exemption no defense.*—It is no defense to an action against a sheriff for failing to make the money on execution, that he declined to levy on property in the possession of the execution debtor, because he honestly believed that it was exempt; and hence, evidence of that fact is inadmissible for him. *Ib.* 180.
  26. *Same*; when claim of exemption admissible for sheriff.—In such action, a claim of exemption, properly verified and filed in office of probate judge after the issue of the execution, but before any levy is made, by the defendant in execution, covering all the property found in his possession, is competent evidence for the defendant; as such claim is made by statute *prima facie* evidence of its correctness as against the debtor's creditors. *Ib.* 180.
  27. *Homestead to widow; negligence of personal representative to report; liability for.*—The failure of personal representative to make a report of homestead of widow and minor children to the probate court, as required by the statute, fixes on him a *prima facie* liability for negligence, and casts on him the burden of exculpation; and the measure of his liability, the estate having been declared insolvent, is the injury resulting to the creditors of the estate from such failure. *Jarrell, Ex'r, v. Payne*, 577.
  28. *Same*; when personal representative not liable for rents of homestead. In such case, the personal representative fully exonerates himself from liability, by showing that the homestead did not exceed, in quantity, eighty acres, or, in value, one thousand dollars, and that it had been occupied, since the decedent's death, by the widow under an asserted claim of homestead on behalf of herself and minor child, to which he had assented; and hence, on proof of



EXEMPTIONS—*Continued.*

these facts on final settlement made by him after declaration of insolvency, he is not chargeable with the rent of the homestead. *Id.* 577.

See ATTACHMENT BOND, 11.

FORCIBLE ENTRY AND DETAINER. See EJECTMENT, 1.

FORFEITURE. See CONTRACTS, 3; CORPORATIONS.

FORGERY. See CRIMINAL LAW, 1-4.

## FRAUD.

1. *Acknowledgment of conveyance of land; its effect, when in form prescribed by the statute.*—When a mortgage or other conveyance of land is duly acknowledged before a proper officer, and the requisite certificate of acknowledgment is affixed in the form prescribed by the statute, this constitutes such cogent proof of free agency and absence of restraint, as to be perfectly conclusive, unless rebutted by clear proof of fraud or imposition practiced on the grantor, in which the officer or grantee participated. *Downing v. Blair*, 216.

See FRAUDULENT CONVEYANCES; INFANTS, 2, 3.

## FRAUDS, STATUTE OF.

1. *Tenant holding over after expiration of term; effect of.*—When a tenant for years holds over after the expiration of his term, the law, in the absence of evidence to the contrary, will imply an agreement to continue the lease for another year upon the same terms and conditions; but such implication is destroyed, if a new contract, essentially different in its terms and conditions, is made, and the inference is fair that it was intended to displace the old one, although it is void under the statute of frauds. *Singer Manfg Co. v. Sayre*, 270.
2. *Same; effect of payment of rent.*—If, however, the tenant continues to hold during the year, and pays his rent, which is materially reduced by the new contract, the payment and acceptance of the rent operate a full recognition of the relation of landlord and tenant as it formerly existed, and subject the tenant to all the covenants contained in the original lease, so far as they are applicable to the new order or condition of things. *Id.* 270.
3. *When note or bond given for land not void under.*—A plea of the statute of frauds (Code, 1876, § 2121, subd. 5) is not available to a defendant sued on a bond or note, given for the purchase-money of land, in which the consideration is expressed as all the vendor's "title or claim to property bought of W. R. L. and J. J. G., and known as the Gentle property," although the note or bond was the only writing executed in reference to the sale of the land. *Smith v. Freeman & Bynum*, 285.
4. *When promise to answer for debt of another not within.*—A promise to pay the debt of another is not within the statute of frauds, where the promisor is interested in property on which the creditor has a lien for the payment of the debt, and, in consideration of the promise, the lien is relinquished, and its relinquishment enures to the promisor's benefit. *Westmoreland v. Porter*, 452.
5. *Forbearance to enforce debt not sufficient to take promise out of its influence.*—The mere forbearance by a creditor to enforce his debt, while a sufficient consideration to support a guaranty of the debt

FRAUDS, STATUTE OF—*Continued.*

- by another, is not sufficient to take the guaranty out of the influence of the statute of frauds. *Ib.* 452.
6. *Same.*—Hence, an agreement in writing by which a merchant, having a lien on a crop grown on rented land for advances, subordinate to an unsatisfied lien for rent, acknowledges himself the tenant's surety for the rent, in consideration of a forbearance by the landlord to enforce his lien, which is not expressed, is void under the statute. *Ib.* 452.
  7. *Same; when agreement not within.*—If, however, a part of the consideration of such agreement was a release by the landlord of a portion of the rent, and such release enured to the surety's benefit, this would take the agreement out of the influence of the statute, although not expressed in the writing. *Ib.* 452.

See ESTOPPEL, 7.

## FRAUDULENT CONVEYANCES.

1. *Intervention of court of equity in aid of creditors.*—At common law, independent of statute, a court of equity would intervene in aid of a creditor who had obtained judgment and execution at law, to remove fraudulent transfers or conveyances of property upon which the judgment or execution operated a lien; and also, on a return of execution "no property found," to reach and subject assets not subject to execution at law. *Mathews v. Mobile Mutual Ins. Co.*, 85.
2. *Effect of filing bill on priority of liens.*—Where the purpose of the suit is to reach equitable assets, the filing of the bill, being in the nature of an equitable levy, creates a lien on the assets sought to be subjected, which is prior to, and prevails against the demands of creditors subsequently coming in, though they are senior judgment creditors, and, at law, may have a prior right to satisfaction from legal assets; but where the aid of the court is sought to subject property on which there is an execution lien, the filing of the bill, not being the creation of a new or other lien, but, like a levy, merely individualizing and rendering the general lien of the execution specific as to the particular property sought to be subjected, does not disturb the priority of liens theretofore existing on the property. *Ib.* 85.
3. *Filing bill does not displace lien of judgment creditor under execution.* A simple contract creditor, proceeding under the statute in a court of equity to have vacated and set aside fraudulent conveyances or transfers of property subject to execution at law, does not thereby acquire a preference over a judgment creditor who has a prior lien under an execution duly issued, and in the hands of the sheriff at the time of the filing of the bill. *Ib.* 85.
4. *Voluntary conveyance; when infected with actual fraud, may be attacked by creditors, existing or subsequent.*—A voluntary conveyance is valid and operative as to subsequent creditors, if it be not shown that there was *mala fides* or fraud in fact in the transaction; but, if actual fraud is shown, whether directed against existing or subsequent creditors, either class can successfully impeach and defeat it, so far as it affects the right to satisfaction of their debts. *Seals v. Robinson & Co.*, 363.
5. *Same; proof of fraud.*—When a voluntary conveyance is attacked for actual fraud by a subsequent creditor of the grantor, the general rule applies, that fraud will not be presumed, but must be proved; and the burden of its proof is on the complainant; but the rule does not require that the fraud must be proved by direct and positive evidence; it may be shown by circumstances leading to a

FRAUDULENT CONVEYANCES—*Continued.*

- rational, well founded conviction of its existence. *Ib.* 363.
6. *Voluntary conveyance by husband to wife ; badges of fraud on attack by subsequent creditor.*—When a voluntary conveyance, executed by the husband to his wife, is attacked for actual fraud, the extent and value of the property conveyed, its kind and character, are all facts to be considered in determining whether the transaction is infected with a covinous intent ; and the fact that by the deed the husband strips himself of all visible, tangible property subject to execution at law, retaining only choses in action of uncertain, doubtful value, while not in itself conclusive, but, it may be, weak and inconclusive evidence of fraud, will awaken suspicion, and add strength to other circumstances which may also be, in themselves, insufficient to establish a fraudulent intent. *Ib.* 363.
  7. *Same ; intent of donor must prevail on attack for actual fraud.*—In such case, the wife being a mere volunteer, and having no equity which will protect her against the rights of creditors, it is not her intent in accepting the conveyance, but the intent of the husband in executing it, which is material ; his fraud being visited upon her, though she may be *doli incapax*, or her intentions may be fair and honest. *Ib.* 363.
  8. *Same ; attempt to create a statutory estate in wife a badge of fraud.*—A provision in such conveyance, that the wife shall hold the property conveyed “as her separate property under the statutes of the State governing the estates of married women,” although it may not be valid as a limitation upon the estate conveyed, creating in her a statutory estate, is indicative of an intention on his part to do so, and thereby vest in himself, under the statute, the property conveyed, as husband and trustee for his wife, entitling him to the rents and profits so long as he continues in that relation, freed from liability for his debts ; and hence, on an attack of the conveyance for actual fraud by a subsequent creditor, it is a material fact, tending to show a covinous intent on the part of the husband in the execution of the conveyance. *Ib.* 363.
  9. *Same ; failure to record as evidence of fraud.*—While the omission to have such conveyance recorded for six months after its execution, the husband remaining in possession, claiming ownership of the property, and vouching the ownership as entitling him to credit, and upon the faith of it obtaining credit, is but a fact or circumstance indicative of fraud, and is open to explanation, which, if just and reasonable, would neutralize all unfavorable inferences that might be drawn from it, yet ignorance, on the part of the wife, of the necessity for registration, is ignorance of the law, which can not be accepted as explanatory of the omission, especially when she knew that her husband, after the execution of the conveyance, and before its registration, embarked in a new mercantile enterprise, contracting debts to a large amount. *Ib.* 363.
  10. *Same ; badges of fraud ; when will authorize impeachment by subsequent creditor.*—The omission to register such conveyance, the want of notoriety of its existence, the magnitude of the property conveyed, when compared with the value of that which was retained, the attempted reservation of a specific benefit to the donor, which he could hold free from liability for debts, his engagement in business very soon after the execution of the conveyance, obtaining a false credit because of his possession, and of representations of ownership of the property conveyed, to which the donee by her supineness, at least, contributed, are all badges of fraud, indicative that the donor’s intent was the hinderance, delay and fraud of creditors, which will authorize a subsequent creditor of the grantor to successfully attack the conveyance, whether the



FRAUDULENT CONVEYANCES—*Continued.*

fraudulent intent was directed against existing or subsequent creditors. *Ib.* 363.

11. *Mortgage on stock of merchandise ; when fraudulent as against unsecured creditors.*—An insolvent debtor mortgaged his stock of merchandise, worth about \$6,000, some of which was of a perishable nature, to secure a debt of \$3,000; the mortgagee not knowing that the debtor was insolvent, but knowing that he was financially embarrassed; and it not appearing that the debtor owned any other property liable to the satisfaction of his debts. In the mortgage the express power to sell the merchandise, or any of it, is not retained by the mortgagor, but the merchandise is left in his possession, and, by implication, it is clear that it was the intention of the parties that he should remain in possession until the law-day, which was ninety days from the date of execution. *Held*,  
 (a) That it is a necessary conclusion that a power of sale was impliedly retained by the mortgagor, which was as much a part of the contract as if expressed.  
 (b) That the mortgage, operating, in the most effectual manner, to shield the property from the attack of the unsecured creditors, for the joint benefit of the mortgagor and mortgagee, inevitably tended to hinder and delay such creditors, and, as against them, it was, therefore, fraudulent and void.  
 (c) That the mortgage, impliedly enabling, as it did, the debtor to sell at his option, and appropriate the proceeds of sale to his own use, is, in effect, a conveyance "made in trust for the use of the person making the same," within the meaning of the statute, and is, for this reason, void as against the unsecured creditors. *Benedict, Hall & Co., v. Renfro Bros.*, 121.
12. *Same ; when mortgagor in possession sells as agent of mortgagee ; effect of.*—The court adds: "We are not to be understood as intimating in this opinion, that a mortgage of merchandise would be rendered conclusively invalid, where the mortgagor is, in good faith, left in possession of the goods, with power to sell for the exclusive use of the mortgagee, holding the proceeds of sale for his benefit. In such case, he may well be deemed the mere agent of the mortgagee, acting for him and in his behalf. *Ib.* 121.
13. *Sale of property by debtor ; what necessary to render fraudulent.*—To render a sale of property by a debtor fraudulent as against creditors, it must be shown that the transaction was infected with a fraudulent intent on the part of the debtor, and that in such intent the purchaser participated. *Shealy & Finn v. Edwards*, 411.
14. *Same ; evidence of fraudulent intent.*—The fraudulent intent of the debtor may be shown by his conduct and declarations, so immediately connected with the transaction as to throw light upon it, or illustrate its nature, but such conduct and declarations are inadmissible against a purchaser for value, unless they are so intimately related to the principal fact, which is assailed as fraudulent, as to constitute a part of the *res gestæ*, or were brought to his knowledge prior to the purchase. *Ib.* 411.
15. *Same ; proof of purchaser's participation in fraudulent intent.*—The participation of the purchaser in the fraud may be shown by proof of such fact or facts as are sufficient to charge him with notice of the debtor's fraudulent intent; and for this purpose, knowledge on his part of facts which, however general in their nature, are sufficient to put him on inquiry, by reasonably exciting in his mind a just suspicion as to the honesty or *bona fides* of the transaction, is sufficient. *Ib.* 411.
16. *Same.*—Transfers by the debtor to his father and sister of promissory notes given by the purchaser for a stock of goods sold on a credit, made several days after the sale, without the purchaser's knowl-

FRAUDULENT CONVEYANCES—*Continued.*

- edge, are not admissible as evidence against him on the issue of fraud *vel non* in the sale of the goods. *Ib.* 411.
17. *Badge of fraud; burden of proof, when not shifted.*—It can not be asserted, as a general rule, that every badge of fraud, casting suspicion on the good faith of a transaction, shifts the burden of proof upon the party claiming under it, so as to require him to explain it; and that, in the absence of explanation, such transaction is to be necessarily pronounced fraudulent. *Shealy & Finn v. Edwards*, 411.
  18. *Right of debtor to prefer creditors.*—A debtor is not forbidden by law to make an honest preference of creditors in the payment of his debts, provided he does so without any intent to hinder or delay his other creditors. *Ib.* 411.
  19. *Sale; when not vitiated for fraud.*—Where a sale by a debtor is entirely free from all imputation of fraudulent intent, it is not sufficient to vitiate it, that its natural result was to hinder, delay or defraud his creditors. *Ib.* 411.
  20. *Sale fraudulent as to creditors, valid inter partes.*—A sale of property by a failing or insolvent debtor, though consummated with a fraudulent intent, is valid as between the parties; and is invalid only as to complaining creditors whose legal rights have been thereby prejudiced. *Ib.* 411.
  21. *Badges of fraud; when charge in reference to, invades province of the jury.*—A charge asserting that designated badges of fraud, when taken together, raise a "violent presumption" of a secret trust in favor of a debtor who has made a conveyance of his property, invades the province of the jury, and is, for that reason, erroneous. *Ib.* 411.
  22. *Fraudulent conveyance; when fraudulent intent must be participated in by grantee.*—To render fraudulent and void, as against the grantor's creditors, a deed to lands executed by a husband to his wife in consideration of a large debt which he owed her, and which constituted a part of her statutory separate estate, it is not sufficient that the husband's intent, in executing the deed, was to hinder, delay or defraud his creditors; but it must also clearly appear that the wife participated in such fraudulent intent. *Kiser & Co. v. Gamble*, 386.
  23. *Sale of personal property exempted from sale, etc., can not be impeached as fraudulent.*—A sale or other disposition of property which is by law exempt from the payment of debts, can not be impeached by creditors as fraudulent; and hence, where a debtor, whose personal property is of less value than one thousand dollars, makes a sale of all of it, the sale can not be impeached for fraud, although it was made for the purpose of hindering, delaying and defrauding his creditors. *Alley v. Daniel*, 403.

GAMING. See CRIMINAL LAW, 5-8.

## GARNISHMENT.

1. *What debts may be subjected by.*—The established rule is, that, in the absence of fraud, only such demands can be subjected by process of garnishment as the defendant, in his own name, could recover from the garnishee in an action of debt, or *indebitatus assumpsit*. *Avery & Son v. Lockhard*, 530.

See CHANCERY, 34.

GUARDIAN AND WARD. See CHANCERY, 10-17; INFANTS, 2, 3.

## HABEAS CORPUS.

1. *Irregularity of commitment no ground for.*—On *habeas corpus*, it is no ground for the discharge of a prisoner committed by a magistrate for a criminal offense, that the commitment is irregular. *Ex parte McGlawn*, 38.
2. *Commitment prima facie cause for detention.*—On *habeas corpus*, a commitment by a magistrate raises a *prima facie* cause for detention; and when un rebutted by testimony, the prisoner should not be released. *Ib.* 38.
3. *Murder; effect of failure to find degree of.*—In murder, the failure of the jury to find the degree of the homicide, while it presents a reversible error on appeal, will, on *habeas corpus*, support a judgment of conviction. *Ex parte Dover*, 40.

See PARENT AND CHILD.

HARD LABOR. See CRIMINAL LAW, 4; CONTRACTS, 1, 2.

HOMICIDE. See CRIMINAL LAW, 10, 11, 13, 15-23.

## HUSBAND AND WIFE.

1. *When decree in favor of the wife erroneous.*—The husband, as the wife's trustee under the statute, is authorized to receive her distributive share in a decedent's estate; and hence, the husband being administrator of an estate of which the wife is one of the distributees, a decree against him and his sureties, on a settlement in a court of equity, is erroneous. *May, Adm'r, v. Green*, 162.
2. *Married woman relieved of disabilities of coverture; capacity to make lease of lands.*—A married woman who has been relieved of the disabilities of coverture under the statute (Code, 1876, § 2731), has the capacity, in conjunction with her husband, to make a valid lease of lands belonging to her, as her statutory estate, for a term of years. *Warren v. Wagner*, 188.
3. *Same; when may sue alone for rent of lands.*—Where a married woman who has been relieved of the disabilities of coverture under the statute (Code, 1876, § 2731), executed, in conjunction with her husband, a lease of lands belonging to her as her statutory estate, for a term of years, and, by the terms of the lease, the rent was made payable to her, she may sue alone for the recovery of the rent. *Ib.* 188.
4. *Ejection of tenant; proof of consent or authority of the wife, when effected by husband.*—When the act of the husband is relied on as an eviction of the wife's tenant, his agency, or her assent to his act may be proved by circumstantial evidence, and may be inferred from his employment in the transaction of her business, her acquiescence in his former acts in reference to the leasing of the premises, their relationship, and the nature and character of the act imputed to him; the inference, however, in such case, is one of fact, to be drawn by the jury, and not one of law, *Ib.* 188.
5. *Settlement of decedent's estate; when decree for wife's interest must be in favor of husband and wife.*—A testator, dying in 1840, devised lands to his wife for life, with remainder to designated children, one of whom was a daughter who married in 1846. The widow died in 1874, and, after her death, the lands were sold under the will by the personal representative. *Held*, on final settlement,
  - (a) That the daughter's interest in the devised lands accrued on the death of the testator, but her right of enjoyment did not arise until the death of the widow.
  - (b) That while the husband's marital rights attached on his marriage, the ownership of the fund resulting from the sale did not vest in him, he not having reduced it to possession.



HUSBAND AND WIFE—*Continued.*

- (c) That a decree on final settlement for the daughter's distributive interest in the fund should be in the name of herself and husband, and not in her name alone. *Moody, Adm'r, v. Hemphill, 268.*
6. *Relief of married woman from disabilities of coverture; what essential to.*—Under the statute authorizing chancery courts to relieve married women of the disabilities of coverture, approved April 15, 1873, an indispensable element of jurisdiction is the petition of the wife, declaring her wish to become a *feme sole*, so far as the statute authorizes the court so to decree and declare her; and while this element of jurisdiction must affirmatively appear on the face of the proceedings, or they will be *coram non judice*, it is not essential that the words of the statute should be strictly pursued, or that any particular words or phrases should be employed; a statement or affirmation in any terms, clearly importing her desire to avail herself of the statute, being sufficient. *King v. Bolling, 306.*
  7. *Same.*—If the petition, in such case, admits equally of two constructions, on collateral attack, that construction must be adopted, which will support, rather than that which will nullify the decree. *Ib. 306.*
  8. *Same; when decree valid.*—Where the wife's petition avers her residence and coverture, her husband's name and citizenship, and her ownership of property, real and personal, and "*asks and prays*" that she "be declared a free-dealer under the laws of Alabama, with the right to buy and sell, hold and convey real or personal property, to sue and be sued as *feme sole*, as provided by" the act approved April 15th, 1873, which is referred to by caption and date of approval, this is a substantial compliance with said act, and, on collateral attack, is sufficient to uphold a decree relieving her of the disabilities of coverture to the extent authorized thereby. *Ib. 306.*
  9. *Same; when consent of the husband sufficient.*—The term *free-dealer* used in the written consent of the husband accompanying such petition, must be accepted in the same sense in which it is used in the petition; and so accepting it, it is the consent required by the statute. *Ib. 306.*
  10. *Mortgage of wife's statutory separate estate void.*—A mortgage, purporting to be executed by a married woman alone, and to convey lands belonging to her as her statutory separate estate, is void, because of her want of capacity to execute it, and because the husband does not join in its execution. *Falk v. Hecht, 293.*
  11. *Relief of married woman from disabilities of coverture; statute strictly construed.*—The statute conferring on the chancellors of this State power to relieve married women of the disabilities of coverture (Code, 1876, §§ 2731-2), is the delegation of power which is in its nature, not strictly judicial, but is a part of the general prerogative power of the General Assembly to define or change the legal *status* of citizens, upon whom the general law had imposed special disabilities; and, like all other statutory powers, it must be exercised in the mode, and for the purposes the statute appoints and declares. *Ib. 293.*
  12. *Same; what essential to validity of decree.*—The mode appointed by the statute for calling such power or jurisdiction into exercise, is by a petition, or an application in the nature of a petition, filed by the wife through her next friend, and disclosing the facts which authorize the court to proceed to the rendition of the decree; and if the wife be not the actor, or if she is the actor, and the petition does not disclose the facts upon which the court is authorized to proceed to the rendition of the decree, all subsequent proceedings are *coram non judice*, and invalid. *Ib. 293.*

HUSBAND AND WIFE—*Continued.*

13. *Same; when petition insufficient.*—Under the statute, the chancellor has no jurisdiction to confer on a married woman the capacity to engage in business, to become a sole trader, or to mortgage lands, solely and separately; and hence, a petition filed by a married woman, which, after averring the citizenship of herself and husband, her ownership of lands described, as her statutory separate estate, that she desires to invest her means in the purchase of a stock of goods and groceries, and that unless she can mortgage her lands she can not make the investment, prays that the chancellor will render a decree, "declaring her a free-dealer, relieving her of the disabilities of coverture as to her said statutory separate estate, so far as to invest her with the right to mortgage the same, to enable her to invest her means in purchasing a stock of goods and groceries," does not conform to the requirements of the statute; and a decree rendered thereon, though following the words of the statute, is unauthorized and void. *Ib.* 293.
14. *Same; when decree void.*—A decree relieving a married woman of the disabilities of coverture, based on a petition which fails to aver that she owned any separate estate, is *coram non jure* and void. *Voltz v. Voltz*, 555.
15. *Conveyance by married woman of lands, her statutory estate; when passes legal title.*—A deed of bargain and sale, absolute on its face, executed by husband and wife as required by the statute, reciting a moneyed consideration, and purporting to convey lands, the statutory separate estate of the wife, in the absence of fraud in the execution of the deed, passes the legal title, and will defeat an action of ejectment by the wife against the vendee, although a portion of the purchase-money may have been paid in the debt of the husband. *Snyder v. Glover*, 379.
16. *Same; when part of consideration the debt of the husband, wife's remedy.*—For that part of the consideration of the deed, in such case, which was paid in the debt of the husband, a suit at law could probably be maintained, and a bill in equity would also probably lie. *Ib.* 379.
17. *Chattel purchased by husband with wife's money; when title vests in her.*—Where the husband purchases personal property with moneys, the proceeds of the sale of lands belonging to the wife's statutory separate estate, the property thus purchased also becomes the wife's statutory separate estate, and for its recovery, she may maintain a claim suit under the statute against an attaching creditor of the husband. *Kennon & Bro. v. Dibble*, 351.
18. *Claim suit by wife for crops grown on lands, her statutory estate; when she may maintain.*—A claim suit under the statute may also be maintained by the wife against an attaching creditor of the husband, for the recovery of crops grown on lands belonging to her statutory separate estate. *Ib.* 351.
19. *Chattel purchased by husband with money borrowed on pledge of wife's property; when title does not vest in her.*—A horse purchased by the husband with money borrowed by him on the pledge of chattels belonging to the wife's statutory separate estate, becomes the property of the husband, and for its recovery the wife can not maintain a claim suit under the statute, although the debt was paid and the pledge redeemed with money also belonging to the corpus of her statutory separate estate. *Ib.* 351.
20. *Chattel taken in exchange for another, the statutory estate of the wife; title to.*—A parol exchange of an article of personal property, belonging to the wife's statutory separate estate, for other personal property, does not divest her title in the former, nor vest in her the title to the latter. (*Evans v. English*, 61 Ala. 416, and *Pollak*

HUSBAND AND WIFE—*Continued.*

- v. Graves*, 72 Ala. 347, reaffirmed, and declared to have become rules of property.) *Ib.* 351.
21. *When deed by married woman void.*—A deed by a married woman, purporting to convey lands, her statutory estate, in which her husband does not join, is a nullity.—*Watson v. Martin*, Adm'r, 506.
  22. *Conveyance by husband to wife; effect of at common law.*—At common law, the husband could not convey to his wife a legal title to any property. Such a conveyance, if executed and free from fraud, would, however, be upheld and protected in equity. *Gluck v. Cox*, 310.
  23. *When equitable not changed into legal title.*—Bringing personal property to which a married woman has only an equitable title, from Mississippi, where she acquired such title, into this State, does not change the status of the title. *Ib.* 310.
  24. *Same.*—The fact that one species of personal property to which a married woman had an equitable title, is changed into another, does not convert the equitable into a legal title. *Ib.* 310.
  25. *Equity of wife in lands purchased by the husband with her money; when inferior to execution lien of judgment creditor.*—Where the husband invests money belonging to his wife, as her statutory separate estate, in lands, and takes the title in his own name, the equity of the wife to charge the lands with the moneys so invested is inferior and subordinate to the lien of a judgment creditor of the husband under an execution issued on the judgment, when, at the time the lien was acquired, the creditor had no notice, actual or constructive, of the wife's equity. *Banks v. Thompson*, 531.
  26. *Conveyance by husband to wife; title conveyed equitable; claim suit.* A conveyance of personal property by a husband directly to his wife does not pass the legal title, but an equitable title merely, which, though coupled with possession, will not support a statutory claim suit in her name for the property, as against an attaching creditor of the husband. *Meyer & Co. v. Sulzbacher*, 423.
  27. *Same; claim suit for recovery of property thereby conveyed; in whose name instituted.*—In such case, the husband, as trustee for his wife, should interpose the claim; and if he refuses, she can then assert her claim in a court of equity. *Ib.* 423.
  28. *Conveyance by husband to wife; estate created by.*—As a direct gift or conveyance by the husband to the wife is valid only in a court of equity, it is regarded as creating in the wife an equitable separate estate, although it does not contain words in exclusion of the husband's marital rights; and hence, the estate thereby created is not within the influence or operation of the statutes enabling the wife to take and hold property owned by her at the time of marriage, or by her subsequently acquired. *Seals v. Robinson & Co.*, 363.
  29. *When property purchased by husband, wife's statutory estate.*—A purchase of personal property by the husband, in the name of the wife, and for her benefit, creates in her a statutory, and not an equitable separate estate, although the purchase-money is paid from his own means, as a gratuity. *Worthing v. Gurley*, 356.
  30. *When wife should sue alone.*—An action of detinue for the recovery of personal property belonging to the *corpus* of the wife's statutory separate estate, is properly brought in the name of the wife alone. *Ib.* 356.
  31. *Detinue by wife to recover statutory estate; right of recovery not affected by removal from the State.*—In detinue by a married woman to recover property belonging to the *corpus* of her statutory estate, her right of recovery is not affected by the fact that, at the time the suit was commenced, she and her husband had removed from and were non-residents of the State. *Ib.* 356.

See CHANCERY, 1-7; FRAUDULENT CONVEYANCES, 6-10; NOTICE, 2.



## INFANTS.

1. *Contract by; when can not be repudiated.*—If a party, after attaining his majority, accepts the benefits of a contract executed by him during infancy, he can not afterwards repudiate its burdens. *Price, Ex'rx, v. Carney, 546.*
2. *Contract by infant; ratification of.*—If an infant, on arriving at age, with a knowledge of all the facts, ratifies a contract for the purchase of lands made by him during infancy, in the absence of any relation of trust or confidence between him and the vendor, and of fraud practiced upon him, he will not afterwards be heard to complain; and if, after attaining his majority, with knowledge of all the facts, he deals with the property in a manner inconsistent with his right to rescind, or waits an unreasonable time before he asserts that right, this operates a constructive ratification, which will uphold the contract. *Voltz v. Voltz, 555.*
3. *Same; ratification of, as between guardian and ward.*—But when the contract is between an infant and his guardian, the courts exercise a narrower scrutiny of the transaction, and exact fuller and clearer proof of fairness, before yielding their sanction thereto; and even after the relation of guardian and ward has terminated, all dealings in property between them are regarded with distrust and *prima facie* disapprobation, until, by lapse of time, the presumption of undue influence has been overcome. *Ib. 555.*

See CHANCERY, 10-17; WITNESS, 4-5.

INJUNCTION. See CHANCERY, 48-60, 91-93; WATERS.

## INTEREST.

1. *Interest on damages for injury to stock.*—A charge instructing the jury, in a case against a railroad company to recover damages for killing stock, that if they found the issues in favor of the plaintiff, they should ascertain the value of the stock killed, and return a verdict therefor, with interest thereon from the date of the loss to the time of the trial, is free from error. *Ala. Great Sou. R. R. Co. v. McAlpine & Co. 113.*
2. *Liability of administrator for.*—An administrator who, without sufficient excuse, postpones making a final settlement and distribution of the estate for an unreasonable period of time, is liable for interest on funds in his hands belonging to the estate, which he ought to have distributed, although he makes the exculpatory affidavit authorized by the statute (Code, 1876, § 2520). *May, Adm'r, v. Green, 162.*

See JUDGMENTS AND DECREES, 2; USURY.

## JUDGMENTS AND DECREES.

1. *Conclusiveness of.*—Judgments are conclusive of all facts or issues actually decided, or necessarily involved, but not of facts collaterally involved. *Watts v. Rice & Wilson, 289.*
2. *Judgment on note given for purchase-money of land; evidence of the debt.*—Where a judgment at law is obtained on a promissory note given for the purchase-money of land, in stating an account of the amount due, on a bill filed to enforce a vendor's lien, interest should be computed on the judgment, and not on the note; the judgment being conclusive, as between the parties and their privies, that at the time of its rendition, the amount for which it was rendered was justly due from the defendant to the plaintiff. *Prickett & Maddox v. Sibert, Adm'r, 315.*

JUDGMENTS AND DECREES—*Continued.*

3. *When res adjudicata.*—On a motion under the statute by the plaintiff in ejectment for rents accruing after judgment, in a case where the parties are tenants in common, the recovery in ejectment is a conclusive adjudication against the defendant, that he had ousted the plaintiff. *Kirkland v. Trott*, 321.
4. *When void.*—A judgment rendered against a party after his death is a nullity. *Meyer v. Hearst*, 390.
5. As to amendment of record *nunc pro tunc* by entry of judgment, see *Herring v. Cherry, Smith & Co.*, 376.
6. *When evidence of debt.*—The recovery of a judgment founded on a debt is evidence of the existence of the debt only as against the defendant in the judgment, and those coming subsequently into privity with him; as to strangers, the recovery establishes nothing. *Barton v. Barton*, 400.

See ERROR AND APPEAL, 7, 8, 18, 19; ESTOPPEL, 1.

JURISDICTION. See CHANCERY; COURT, PROBATE.

## LANDLORD AND TENANT.

1. *Lien of landlord on tenant's crop; right of recovery against stranger receiving and disposing of crop; application of payments.*—During 1879, G., who was engaged in merchandising, rented to S. for the year a plantation owned by him, and, as landlord, made advances to him, on which, at the end of the year, there was a small balance unpaid. On 1st January, 1880, V. became a part owner and tenant in common with G. in the plantation, and S. renewed and continued his lease for that year, and G. continued to advance to him until March of that year, when V. became a partner with him in merchandising, and, under the firm name of G. & Co., they continued to advance to S. as their tenant; and the same relation was continued through the year 1881, and during that year some advances were also made. At the time the partnership was formed between G. & V., the former transferred to the partnership the claim on S. for advances. In March, 1880, when the partnership was formed, the amount due from S. to G. for advances, including the unpaid balance for 1879, amounted to \$117; and, at the end of 1880, the amount due for advances was \$490, when S. made a payment reducing it to \$216, which was, during 1881, increased by advances made during that year. In the spring of 1881, S. made arrangements with L. & M., merchants, for advances, and gave them, as security, a crop-lien note and also a mortgage on the crop, which were duly recorded; and during that year, he obtained from them between \$400 and \$500 in advances; and in latter part of the year, they received nine bales of cotton grown on said plantation, sold it, and applied the proceeds to their claim against S. At the time L. & M. agreed to advance to S., they knew he was the tenant of V. & G., and when they received the cotton, they knew it had been grown on said plantation, and that G. & Co. claimed a lien on it for advances made as landlords. *Held*, in an action by G. & Co. against L. & M.,

(a) That plaintiffs were entitled to recover the amount of S.'s debt to them for the advances made to him, with interest thereon, not to exceed the amount L. & M. realized from the sale of the cotton received by them, with interest thereon.

(b) *Quære*—If any question arises as to the right to recover for the advances made before the partnership was formed between G. and V., must not that portion of the account be considered as paid and eliminated from the suit, under the principle declared in *Lee*?

## LANDLORD AND TENANT—Continued.

- v. Tannenbaum*, 62 Ala. 501 and, *Lewis v. Dillard*, 66 Ala. 1 ?  
*Lake & Marshall v. Gaines & Co.*, 143.
2. *Same*; nature of.—The statute giving to a landlord a lien on his tenant's crop for advances is paramount to, and much more comprehensive than the lien a stranger may contract for under the crop-lien law; the court declaring that it is "very difficult to define, as matter of law, what articles of commerce are beyond the pale of the very comprehensive words" contained in the statute. *Ib.* 143.
  3. *Lien of landlord when advances made by another at his instance and request*; operation of the statute.—By extending the lien of the landlord so as to cover advances made by others at his instance and request, it was not intended to confer upon him the power to appoint another to make advances to his tenant, thereby clothing such person with the lien declared by the statute; but merely to afford him indemnity against any liability he might thereby assume for the tenant. *Bell & Co. v. Hurst & McWhorter*, 44.
  4. *Same*; when does not exist.—Hence, if the advances are made by a third person with the understanding, either express or implied, that he is to look to the tenant, and not to the landlord, for payment, although made at the instance of the landlord, and on his request, no liability resting on the landlord, there is no room for the operation of the statute, and the lien does not exist. *Ib.* 44.
  5. *Lien for advances*; what necessary to its validity.—When the statutory lien for advances is asserted, not only must the terms of the "written note or obligation" be in substantial compliance with the requirements of the statute, but all the articles advanced and for which the note is intended by the parties as a security, must be of the statutory class; and hence, the lien does not exist, when the note or obligation is founded, in part, on other considerations than the advances contemplated by the statute. *Ib.* 44.
  6. *Lien of landlord on crops grown on rented lands*; when does not exist in favor of mortgagee of landlord.—A mortgagee, giving notice to the tenant of the mortgage, that he claims the rent falling due in the future, does not become, by virtue of the notice, entitled to the statutory lien on the crops grown on the rented premises for the payment of the rent; nor can he enforce the lien by attachment. *Drakford v. Turk*, 339.
  7. *When tenant of mortgagor not tenant of mortgagee*.—When a mortgage on lands is executed prior to the renting of the premises by the mortgagor, and prior to the entry of the tenant, a mere notice by the mortgagee, that he claimed the rent, does not convert the tenant into the tenant of the mortgagee. *Ib.* 339.
  8. *Injunction against waste by tenant in possession*; what necessary to relief.—While a court of equity has, and will fully exercise its preventive jurisdiction, by injunction, to protect the reversion against waste by the tenant in possession, it will not interfere, unless it is shown that a positive misuse of the premises, or their conversion to uses unauthorized, is contemplated and reasonably apprehended. *McDaniel v. Callan*, 327.
  9. *Same*.—Hence, where, by the terms of the lease, the tenant is not only expressly authorized, but is required, as one of the considerations moving the landlord in its execution, to reduce to cultivation during the term uncleared portions of the demised premises, a court of equity will not intervene by injunction to restrain him from cutting down timber on the lands, for the purpose authorized by the lease. *Ib.* 327.
  10. *When a covenant in a lease runs with the land*.—A reservation in a lease of lands which are largely, if not wholly uncleared and unimproved, to the lessee, of the right to the use and occupation, for



LANDLORD AND TENANT—*Continued.*

- a designated period, of such parts of the premises as he may reduce to cultivation, or clear during the term, like a covenant for quiet enjoyment, or a covenant to cultivate the land in a particular manner, or a covenant for the renewal of the lease, runs with the land, and is binding upon the assignee of the reversion. *Ib.* 327.
11. *Lease; special provision for its termination construed.*—Under a stipulation in such lease that, in the event of a sale of the demised premises by the lessor during the term, the lessee should surrender the possession on “being paid a reasonable valuation for the unexpired term,” a mere sale and conveyance of the premises by the lessor do not operate a determination of the lease; but the stipulation merely reserves to the purchaser, or the assignee of the reversion, the privilege or option of determining the lease, upon a performance of the condition expressed—the payment or tender to the lessee of the reasonable value of the unexpired term; and, until such payment or tender is made, the lessee has the right to the unmolested use and enjoyment of the premises, and the right to continue the clearing, or reduction to cultivation, of the lands, according to the terms of the lease. *Ib.* 327.
  12. *Rent of decedent's lands; when contract for repairs binding on administrator.*—An administrator having, under the statute, the power to rent the lands of his intestate, this power and the duty to rent resulting therefrom authorize him to make such repairs as are necessary to render the lands tenantable; and if, even in the absence of such power, an administrator should stipulate with the tenant for making repairs, he could not avoid the stipulation, and whoever claimed its enforcement would take it *cum onere*. *Vandegrift, Adm'r, v. Abbott, 487.*
  13. *Rent of lands; right of tenant to recoup damages resulting from failure to repair.*—In an action against a tenant for the recovery of rent, if he is entitled to damages in consequence of the failure of the landlord to repair according to a covenant in the lease, or in an agreement made at the time of the contract of renting, he may recoup the damages by way of reducing or extinguishing the rent. *Ib.* 487.
  14. *When parol evidence admissible in aid of written contract.*—Where only the promise of a tenant to pay rent is reduced to writing, parol evidence is admissible to establish a distinct and separable contract on the part of the landlord to repair, made contemporaneously with the writing. *Ib.* 487.
  15. *Agreement to repair; measure of damages.*—When a landlord stipulates to make repairs, and fails to do so, it is not the duty of the tenant to cause the repairs to be made, limiting his recovery to the expenses thereby incurred; but he has the right to rely upon the landlord's promise to make them, and for a breach of the promise, the landlord is liable for such damages as are the natural and proximate result of the breach. *Ib.* 487.
  16. *Lease; when lessee not bound to repair or rebuild.*—An express stipulation in a lease, binding the lessee to surrender the premises, at the expiration of the term, “in as good order and condition as the same now are, reasonable use and wear and tear excepted,” is merely the expression of an obligation which the law would imply in its absence, and does not impose upon the lessee a liability to repair or to restore, in the event of a destruction of the premises, or a material part thereof, during the term, by fire, or other unavoidable accident. *Warren v. Wagner, 188.*
  17. *Liability of lessee for rent in event of destruction of premises: exception to general rule.*—A lessee of the premises destroyed during the term by unavoidable accident is not excused from the performance of an express provision or covenant to pay rent for the term, unless he has protected himself by an express stipulation for the ces-

LANDLORD AND TENANT—*Continued.*

sation of rent in that event, or the landlord has covenanted to repair or rebuild; but there is an exception to this general rule, that the destruction must not be of the entire subject-matter of the lease, leaving nothing capable of holding and enjoyment by the lessee. *Ib.* 188.

18. *Same.*—Where the lease is of lands and tenements, with the right of quarrying stone during the term, a destruction of a limekiln located on the lands does not excuse the lessee from payment of the rent for the balance of term, although the use of the kiln may have been the principal consideration moving the lessee to enter into the lease, and from it he may have expected to have derived his principal profits. *Ib.* 188.
19. *Eviction of tenant; what constitutes, and what are its effects.*—The eviction of a tenant consists in the disturbance of his possession, his expulsion or amotion, by title paramount, or by the entry and act of the landlord, depriving him of the enjoyment of the demised premises, or a portion thereof, and operating, partially or wholly, a bar to the right of the landlord to demand rent falling due in the future. *Ib.* 188.
20. *Same; mere trespass by landlord does not amount to.*—A mere trespass by the landlord upon the demised premises, not intended by him as a permanent amotion or expulsion of the tenant, or to deprive him of the possession and enjoyment of the premises, may entitle the tenant to damages, but does not amount to an eviction. *Ib.* 188.
21. *Same; when partial and when entire; effect on rents due in future.* If the landlord, by himself, or by the act of another, which he authorized, or to which he assents, enters upon, and takes possession of a material portion of the demised premises, the entry and possession constitute, at the election of the tenant, an eviction from the whole, authorizing an abandonment of the lease, and absolving the tenant from the payment of rent falling due in the future, or a partial eviction only, discharging the rent *pro tanto*. Nothing, however, less than an entire abandonment or surrender will operate a dissolution of the tenancy, and a suspension or discharge of the whole rent. *Ib.* 188.
22. *Same; refusal to restore no element of eviction.*—When the landlord enters upon, and takes possession of the demised premises, there is no duty resting upon the tenant to demand of the landlord restoration, and, of consequence, there can be no necessity for a refusal to restore, as an element of eviction. *Ib.* 188.
23. *Same; proof of consent or authority of the wife, when effected by husband.*—When the act of the husband is relied on as an eviction of the wife's tenant, his agency, or her assent to his act may be proved by circumstantial evidence, and may be inferred from his employment in the transaction of her business, her acquiescence in his former acts in reference to the leasing of the premises, their relationship, and the nature and character of the act imputed to him; the inference, however, in such case, is one of fact, to be drawn by the jury, and not one of law. *Ib.* 188.

See FRAUDS, STATUTE OF, 1, 2.

LARCENY. See CRIMINAL LAW, 24; SLANDER, 3.

LIEN. See EXECUTION, 1-3, 6-8; FRAUDULENT CONVEYANCES, 1-3; LANDLORD AND TENANT, 1-6; VENDOR AND PURCHASER, 1-3.

## LIMITATIONS, STATUTE OF.

1. *When bill for specific performance barred.*—When the vendee under

LIMITATIONS, STATUTE OF.—*Continued.*

an executory contract for the sale of lands is not, and has not been within ten years, in possession, and the possession has not been in recognition of his right, the statute barring an action at law to recover damages for a breach of the covenant to convey, upon the expiration of ten years from the breach, applies to a suit in equity by the vendee for a specific performance. *Cotton v. Cotton*, 345.

2. *Motion for rents accruing after judgment in real action ; statute of limitation.*—A motion under the statute by the plaintiff in a real action for rents accruing after judgment, and before delivery of possession (Code, § 2958), is a substitute for an action for mesne profits, is in the nature of a suit for use and occupation, or for arrears of rent, and belongs to the class of actions which are barred by the statute of limitations of six years (Code, § 3226). *Kirkland v. Trott*, 321.
3. *Continuing trust ; when time does not run against.*—Where there is a continuing trust, with active duties required of, and performed by the trustee, the case is analogous to a running, mutual account, and time does not run against it; but each act done under, or in recognition of the trust, is a renewal of the obligation it imposes. *Whetstone v. Whetstone's Ex'rs*, 496.
4. *Replication of statute of limitations to plea of set-off ; when demurrable.*—The statute of limitations can not defeat a plea of set-off, unless the bar was complete when the plaintiff's cause of action accrued (Code, 1876, § 2996); and a replication setting up the statute is bad on demurrer, when it appears from the complaint and plea, that the bar was not complete when the plaintiff's cause of action accrued. *Jeffries v. Castleman*, 262.

See CHANCERY 3; ADVERSE POSSESSION, 2, 3, 5, 8.

LIS PENDENS. See NOTICE, 1, 2, 4.

## MALICIOUS PROSECUTION.

1. *Alias warrant of arrest ; when admissible in evidence.*—A warrant of arrest issued on affidavit by the county court having been returned not executed, it is the duty of the court, of its own motion, to issue an *alias*, that the defendant may be brought to trial and the prosecution ended; and in an action for malicious prosecution by the accused against the prosecutor, the latter can not object to the *alias* as evidence, on the ground that it was issued without his request. *McLeod v. McLeod*, 483.
2. *Action for ; when evidence of age of plaintiff inadmissible.*—In an action for a malicious prosecution for the offense of trespass after warning, it is not permissible for the plaintiff to prove that she is a very old person. *Ib.* 483.
3. *Same ; probable cause.*—Probable cause not depending on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting, a want thereof can not be inferred from a failure or abandonment of the prosecution; but the fact that the prosecution was abandoned should be weighed by the jury, in connection with the other circumstances of the case, in determining whether, at the institution of the prosecution, there was probable cause for believing the accused was guilty of the offense charged. *Ib.* 483.
4. *Same ; when probable cause a question of law.*—The facts being undisputed, probable cause *vel non* is a question of law. *Ib.* 483.

MANDAMUS. See CORPORATIONS; EXEMPTIONS, 20.

MARRIAGE LICENSE. See STATUTES, 1-3.



MARRIAGE SETTLEMENT. See CHANCERY, 1.

MARSHALING SECURITIES. See CHANCERY, 31-35.

## MILL-DAM.

1. *Erection of ; jurisdiction of probate court.*—The jurisdiction of the probate court touching the erection of dams for mills, etc., being special and limited, the record must affirmatively show a full and substantial compliance with all the requirements of the statute. *McAllilley v. Horton*, 491.
2. *Same ; inquest of jury.*—In such case, the inquest of the jury is sufficient if it is clearly responsive to all the matters which the statute requires the jury to investigate ; but any finding of the jury which falls short of this requirement, is defective, and will authorize, on motion of any party to the record, the entire proceedings to be vacated or quashed. *Ib.* 491.
3. *Same ; oath to jury.*—Where the recital of the inquest is, that the jury, before proceeding to their investigation, were “first duly sworn and charged by said sheriff as required by law,” and the return of the sheriff shows that the jury were sworn and charged by him in the precise language of the statute, this sufficiently shows that the jury were sworn as required by the statute. *Ib.* 491.
4. *Same ; sufficiency of inquest.*—Where the jury, after being charged by the sheriff according to the exact requirements of the statute, find that “no land, above or below the proposed site of the dam, will be damaged more than by the natural overflow of the creek on which the dam is to be built,” this is sufficient to negative the idea that either the residences of the owners of such lands, or the outhouses, enclosures, gardens or orchards thereon would be injured by the overflow resulting from the erection of the dam. *Ib.* 491.

MOBILE, INFERIOR CRIMINAL COURT OF. See CONSTITUTIONAL Law, 8, 10.

## MORTGAGES.

1. *Right of mortgagee to possession and rents.*—A mortgage in fee, though executed to secure a debt falling due at a future day, operates as a present, immediate conveyance and transfer of all the right, title, interest and estate of the mortgagor in the mortgaged premises, and, in the absence of a reservation to the mortgagor of possession, or of the right to take and enjoy the rents and profits, until default in the performance of the condition, entitles the mortgagee to the present, immediate right of entry and possession, and to the rents subsequently accruing ; and a subsequent assignment of the rents is subordinate to, and can not prevail against the prior grant of the reversion contained in the mortgage. *Coffey v. Hunt*, 236.
2. *Mortgage ; legal title after default in mortgagee.*—After the law-day of a mortgage, and default in the payment of the secured debt, the legal title to the mortgaged premises vests in the mortgagee, and he may convey it to another, although he is not in possession, and does not assign the secured debt. *Downing v. Blair*, 216.
3. *Same ; when mortgagee a purchaser for value.*—When a mortgage, securing a pre-existing debt, is executed in consideration of an extension of the debt, this constitutes the mortgagee a purchaser for value. *Ib.* 216.
4. *Transfer of one of several notes secured by mortgage ; priority of lien.* The transfer of one of several notes secured by mortgage clothes the transferee with the right to be first paid out of the mortgaged property. *Knight v. Ray*, 383.

## MORTGAGES—Continued.

5. *Bill to foreclose mortgage by assignee of debt ; when mortgagee a necessary party.*—While in equity an assignment of a debt secured by a chattel mortgage, if not otherwise expressed, operates an assignment of the mortgage, entitling the assignee to its foreclosure, yet, the mortgagee, having the legal title, is an indispensable party, in whose absence the court will not proceed to a decree. *Fulgham v. Morris*, 245.
6. *Mortgage securing debt payable in installments ; when may be foreclosed.*—When a debt secured by mortgage is payable in installments, ordinarily, and in the absence of stipulations to the contrary, the mortgage is forfeited *pro tanto* by default in the payment of any installment as it falls due, and the mortgagee may proceed to a foreclosure; and if before final decree, other installments become due, they should be embraced in the decree. *Ib.* 245.
7. *Same ; effect of payment of past due installment after bill filed.*—The mortgagor, by paying the installments of such debts which are past due, after bill filed for a foreclosure, is entitled to put a stop to further proceedings; and, if he make such payment, the court has no power to render a conditional or provisional decree of foreclosure, if default should be made in the payment of the installments falling due in the future. *Ib.* 245.
8. *Penalty for failure to enter of record satisfaction of mortgage ; statute strictly construed.*—The statute providing a penalty against a mortgagee for failure to enter of record satisfaction of the mortgage within three months after payment of the mortgage debt, and after request in writing to make such entry (Code, §§ 2222-23; Pamph. Ac s, 1880-1, p. 32), being penal in its nature, must be strictly construed and can not be extended by implication. *Jarratt v. McCabe*, 325.
9. *Same ; when request insufficient.*—Where there are two mortgagors, a written request signed by one of them, in his own name, is not a compliance with the statute providing such penalty, although it was made with the knowledge and concurrence of the other. *Ib.* 325.
10. *Action to recover penalty for failure to enter satisfaction of mortgage ; when mortgagee not estopped from denying satisfaction.*—In an action against a mortgagee to recover the penalty provided by the act of March 1st, 1881, amending sections 2222-23 of the Code of 1876, for failure to enter of record satisfaction of a mortgage (Pamph. Acts, 1880-1, p. 32), the defendant is not estopped from denying that the mortgage had been satisfied, by reason of the fact that he had not, within three months after the request to enter satisfaction, commenced a suit involving that question, and, at the time of the request, no such suit was pending. *Scott v. Field*, 419.
11. *Same ; how right of recovery affected by usury.*—If the mortgage debt is usurious, and the mortgagor had fully paid the principal before making the request for entry of satisfaction, and of that fact there is no real ground of contestation, no reason for substantial doubt, the mortgagee can not withhold the entry of satisfaction, because the nominal amount of the debt, including the stipulated interest, had not also been paid. *Ib.* 419.

See ADVERSE POSSESSION, 4-6; CHANCERY, 38, 39; EXEMPTIONS, 14; FRAUDULENT CONVEYANCES, 11, 12; HUSBAND AND WIFE, 10; LANDLORD AND TENANT, 6, 7.

## NEGLIGENCE.

1. *Action for personal injuries inflicted by domestic animal ; degree of care required of defendant.*—In an action for the recovery of damages for personal injuries sustained by plaintiff in being knocked

NEGLIGENCE—*Continued.*

down and run over by a steer chased or driven by defendants' servants along the streets of a city, a charge given at the defendants' request, instructing the jury that "if the defendants and their employees, in the management of the steer, exercised such care as men of ordinary prudence and caution would have exercised under similar circumstances, then the defendants are not responsible for the misfortune to plaintiff," lays down a correct rule as to the degree of care required of the defendants and their servants in such case. *Matson v. Maupin & Co.*, 312

2. *Same.*—Nor is such charge rendered subject to criticism by reason of the fact that it embodies the further proposition, that "for the convenience of mankind in carrying on the affairs of life people, as they go along public roads, must expect or put up with such mischief as reasonable care on the part of others can not avoid." *Ib.* 312.

See COMMON CARRIERS; RAILROADS; SHERIFF; EXECUTORS AND ADMINISTRATORS, 9, 10.

## NON COMPOS. See CHANCERY, 18-23.

## NOTICE.

1. *Lis pendens* as constructive notice.—It is settled in this State, that to constitute *lis pendens* constructive notice of claim or asserted ownership, not only must the suit be instituted, but process must be issued and served. *Banks v. Thompson*, 531.
2. *Same.*—Hence, the mere filing of a bill in equity by a wife against her husband alone, seeking to charge lands purchased by, and conveyed to him, with a trust for moneys belonging to her as part of her statutory separate estate, which he had invested in the lands, does not operate as constructive notice of the wife's equity to a judgment creditor of the husband, who had acquired a lien on the lands by issue of an execution prior to service on the husband. *Ib.* 531.
3. *Notice to attorney; when notice to client.*—Notice to an attorney, while in the employment and service of his client, of facts connected with the business in which he is engaged, operates as notice to the client. *Price, Ex'rx, v. Carney*, 546.
4. As to effect of *lis pendens* as notice, see *Kirkland v. Trott*, 321.
5. As to burden of proof when defense of *bona fide* purchase is relied on, see *Barton v. Barton*, 400.

## NUISANCE. See CHANCERY, 57-60; WATERS.

## OVERRULED CASES; CASES DOUBTED, LIMITED, ETC.

1. *Evans v. Bell*, 20 Ala. 509, on the question of the admissibility of parol evidence, where there is a written contract, to establish a distinct and separable part of the contract, obligatory on the other party but not reduced to writing, overruled in *Vandegrift, Adm'r, v. Abbott*, 487.
2. *Farley v. Riordon*, 72 Ala. 128, as to construction of § 2841 of Code, 1876, touching the return to the probate court of homestead to widow, etc., qualified and limited in *Jarrell, Ex'r, v. Payne*, 577.
3. *Pepper v. George*, 51 Ala. 190, expressly overruled in *Downing v. Blair*, 216.
4. *South & North Ala. R. R. Co. v. Wood*, 71 Ala. 215, explained and modified in *Montgomery & Eufaula Ry. Co. v. Culver*, 587.
5. *Walker v. Griffith*, 60 Ala. 361, declared unsound in *Ballentyne v. Wickersham*, 533.



## PARENT AND CHILD.

1. *Habeas corpus by father for custody of child ; when properly refused.*  
Where, on the hearing of an application by a father for a writ of *habeas corpus*, to obtain the custody of his child from the latter's maternal grandmother, with whom he had been left by a dying mother, in the absence of the father in a distant State, it is shown that the child was sick, requiring and receiving the tenderest nursing, and that the child's sickness would render it at least perilous to attempt his removal, his sickness is a sufficient reason for refusing the relief sought. *Ex parte Murphy*, 409.
2. *Same.*—Should, however, the child's health become established, the application can be renewed; but it further appearing that the father had been intemperate, and evidence introduced on his behalf tending to show that he had reformed, it would seem that a sufficient time should be allowed to elapse, to test the fact and sincerity of the father's reformation, the welfare of the child being the paramount inquiry. *Ib.* 409.

## PARTITION.

1. *Petition for sale of lands for division among joint owners ; jurisdictional averment.*—An application to the probate court under the statute, for the sale of lands owned by tenants in common, for division among the owners, "must set forth the names of all the persons interested in the property" sought to be sold. This is a jurisdictional averment; and an order of sale granted on an application which, on its face, shows that it has failed to set forth the names of all the persons interested in the property, is void, and a purchaser at a sale made thereunder acquires no title. *McCorkle v. Rhea*, 213.
2. *Same.*—Hence, an order for the sale of lands, in such case, granted on the application of the administrator of a deceased tenant in common, which avers that his intestate owned, in his life-time, a designated undivided interest in the lands, but does not set forth the names of the persons who owned such interest at the time of the application, or to whom it descended on the death of the intestate, is void; and the title of the heirs is not divested by a sale made under such order. *Ib.* 213.

See CHANCERY, 25-28.

## PARTNERSHIP.

1. *Admissions of one partner after dissolution against the other incompetent.*—The admissions of one partner, made after a dissolution of the partnership, and after he had transferred his interest to his copartner, are not admissible in evidence against the latter, in a suit between him and a debtor of the partnership. *Jeffries v. Castleman*, 262.
2. *Whether created, how determined.*—In determining whether a partnership exists, as between the parties themselves, or in controversies not involving the rights of third parties who have dealt with them as partners, the intention of the parties is the single question for consideration; and when the contract is in writing, the intention must be collected from its words, aided, if there be ambiguity in its terms, by resort to the circumstances under which it was made, the relative situation of the parties, the occasion giving rise to the contract, and the objects and purposes to be accomplished. *Taylor, Adm'r, v. Bush*, 452.
3. *Test of, and exception thereto.*—While the test of a partnership generally is, whether there is a community of interest, a participation in losses and profits, this test does not apply, when a party, with-

PARTNERSHIP—*Continued.*

out interest in the capital or business, is merely to be compensated for his services from the profits resulting from a common adventure or enterprise. In such case, the relation of the parties is that of tenants in common in the results of the joint adventure or enterprise, and not that of partners. *Ib.* 432.

See ATTACHMENT, 1; ATTACHMENT BOND, 9-11.

PAYMENT. See CHANCERY, 32, 34; LANDLORD AND TENANT, 1 (b).

PASSENGER. See COMMON CARRIER, 1-4.

## PLEADING AND PRACTICE.

1. *Action against common carrier for failure to deliver baggage; when description of baggage sufficient.*—In an action by a passenger against a common carrier for damages for failure to deliver baggage, a description of the baggage in the complaint as "one trunk," containing designated articles of jewelry and merchandise, and "clothing and personal wearing apparel," is, on demurrer, sufficiently certain.—*Montgomery & Eufaula Ry. Co. v. Culver* 587.
2. *Same; what a fatal variance between allegation and proof of contract.*—Where, in an action by a passenger against a corporation operating an intermediate line of railroad, for damages for the failure to deliver baggage, the contract is alleged to have been made with the defendant for the transportation of the baggage to a designated point, which is situate on the last connecting line, to be there delivered to the plaintiff, and the proof shows that the contract was made with the company operating the first connecting line, and is an agreement on the part of the defendant for the transportation and delivery of the baggage, not to the plaintiff at the point of destination, but to the company operating the last connecting line, there is a variance between the allegations and proof, which is fatal to the right of recovery. *Ib.* 587.
3. *Variance.*—If redundant allegations are introduced into pleadings, and they are descriptive of that which is material, a variance between the allegations and proof is fatal, of the same consequence as a variance between the allegation of an essential fact, and the proof of that fact. *Gilmer v. Wallace*, 220.
4. As to variance, see, also, *South & North Ala. R. R. Co. v. Schaufler*, 136.
5. *When averment in complaint mere descriptio personæ.*—Where, in an action against a judge of probate for issuing a marriage license to a minor, etc., under section 2681, as it originally stood, the complaint describes the minor to whom the license was issued by her name, and the further designation, that she is the plaintiff's daughter, the latter words are mere *descriptio personæ*, which it is not necessary to prove, the original statute authorizing a recovery of the penalty by any person who elected to sue for it. *Roberts v. Pippen*, 103.
6. *Pleading and practice; when allegations of time not material.*—Allegations of time, when not descriptive of the subject of the action, are not required to be proved strictly as alleged; and hence, in an action on an account, the failure of the plaintiff to prove the exact date when the account became due, is not a fatal variance. *Huckabee v. Shepherd*, 342.
7. *Suit on contract by telegraph company for delivery of message.*—If an agent, in delivering and paying for a message to be forwarded, discloses the name of his principal, for whom he is acting, the contract for the transmission and delivery of the message being

PLEADING AND PRACTICE—*Continued.*

- oral, this makes it the principal's contract, upon which he can, and should sue in his own name. *Daugherty v. Am. Union Tel. Co.*, 168.
8. *Plea of want of consideration; when not available as defense.*—It was held that, under the facts in this case, as hypothetically stated in charges given at the plaintiff's request, the plea of a want of consideration in the note or bond sued on was not available to the defendants. *Smith v. Freeman & Bynum*, 285.
  9. *Recoupment of damages; statutory provisions.*—The act approved January 25th, 1879, entitled "An act to provide the mode of procedure in cases in which the claim of recoupment of damages is interposed" (Pamph. Acts 1878-9, p. 154), does not add to or enlarge the class or number of claims or demands which may be the subject of recoupment, but only authorizes a judgment for the defendant for any excess of damages over and above the plaintiff's claim, as under the plea of set-off. *Martin, Dumez & Co. v. Brown, Shipley & Co.*, 442.
  10. *Same; what demands may be recouped.*—In an action *ex contractu*, the defendant can not claim a recoupment of damages on account of defamatory words, written or spoken, published of him by the plaintiff, though they may relate to the contract sued on, its subject-matter, or breach. *Ib.* 442.
  11. *Plea in abatement: must give plaintiff a better writ.*—While, under the statute, a plea, whether in bar or in abatement, is sufficient, if the facts are so stated that a material issue can be taken thereon, the rule still prevails that a plea in abatement must give the plaintiff a better writ, this being, in such plea, essentially matter of substance. *Mohr v. Chaffe Bros. & Co.*, 387.
  12. *Replication of statute of limitations to plea of set-off; when demurrable.*—The statute of limitations can not defeat a plea of set-off, unless the bar was complete when the plaintiff's cause of action accrued (Code, 1876, § 2996); and a replication setting up the statute is bad on demurrer, when it appears from the complaint and plea, that the bar was not complete when the plaintiff's cause of action accrued. *Jeffries v. Castleman*, 262.
  13. *Motion to exclude illegal evidence; when may be made.*—A motion for the exclusion of evidence, which is not merely secondary, but in itself illegal or irrelevant, may be entertained at any stage of the cause prior to the retirement of the jury. *Warren v. Wagner*, 188.
  14. *Failure to write "given" on charge; effect of.*—The omission of the presiding judge to write "given" upon instructions requested by the defendant in a criminal case, and given to the jury, as required by the statute, is not an error of which advantage can be taken on a motion in arrest of judgment. *Holley v. State*, 14.
  15. *Verdict; form of may be corrected by the court.*—While the court can not dictate to a jury the verdict they should return, it may, after the verdict has been returned, direct them to put it in proper form, and, to this end, may instruct them as to what that form should be. *Wortham v. Gurley*, 356.
  16. *When statement of counsel, in argument before jury, a reversible error, see East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 466.

See ATTACHMENT; CERTIORARI; DETINUE; EJECTMENT; SLANDER; TRIAL OF RIGHT OF PROPERTY; TROVER.

PRINCIPAL AND AGENT. See AGENCY.

RAILROADS.

1. *Care and diligence in running trains.*—The rule governing the duty and liability of railroad companies in running their trains is, that



RAILROADS—*Continued.*

their employees must bestow on the service that degree of care and diligence which very careful and prudent persons give to their own affairs of similar magnitude and delicacy. *Ala. Great Sou. R. R. Co. v. McAlpine & Co.*, 113.

2. *Presumption of negligence.*—When injury has been shown to have been inflicted by a railroad company, in the running of trains, the burden is shifted to the company to repel the imputation of negligence, by proof sufficient to establish a *prima facie* case of proper diligence. *Ib.* 113.
3. *Non-observance of statutory rule ; liability resulting from.*—It is the duty of employees of railroad companies to observe the statutory regulations as to blowing whistles, etc. (Code, 1876, § 1699) ; and in case of injury done by a running train, which could be reasonably traced to a non-observance of these regulations, it becomes the duty of the company to prove that they had been complied with ; but this principle can not be extended to such injuries as are not caused by the non-observance of the regulations. *Ib.* 113.
4. *Diligence required of, in running trains.*—The law does not require that a railroad company, in its management of a running train, should attempt the impossible in order to prevent injury or accident ; yet, it must resort to the necessary appliances to prevent injury or accident, so long as there is hope ; and, when sued, the *onus* is on the company to show the utter fruitlessness of any attempt that might be made. *Ib.* 113.
5. *When company not liable for injury to stock.*—If a moving train of a railroad company has a proper head-light and brakes in good order, is skillfully officered, is not running at undue speed, and the officers and agents directing the movements of the train are attentive and vigilant, and guilty of no negligence, then, if by reason of the weather, or other unavoidable hinderance, an animal on the track is not seen until it is too late to save it by the use of the appliances belonging to the train, the company is not liable for the loss or injury. *Ib.* 113.
6. *Liability for interest on damages for injury to stock.*—A charge instructing a jury, in a case against a railroad company to recover damages for killing stock, that if they found the issues in favor of the plaintiff, they should ascertain the value of the stock killed, and return a verdict therefor, with interest thereon from the date of the loss to the time of the trial, is free from error. *Ib.* 113.
7. *Liability of railroad company for injury to stock ; when omitted duty fails to confer right of recovery.*—A railroad company is not necessarily liable for injuries done to stock, on proof tracing some acts of omitted duty to the company's employees ; if the omitted duty did not cause, or in any way contribute to the injury, its omission confers no right of recovery. *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 466.
8. *Same.*—Nor is it necessary that the company's employees shall attempt the impossible ; and hence, if, without fault of such employees, a danger is not, and can not be discovered until all appliances known to the best regulated railroad motive power are clearly powerless to avert, or mitigate the injury, then a failure to apply such useless agencies imposes no liability ; and particularly would this be the case, if, by attempting the impossible, the chances of another or greater peril would be increased. *Ib.* 466.
9. *Same.*—The engineer, while attending to the other wants of his train, must be constantly on the lookout for obstructions on the track ; and this requirement is met, when he bestows on the service that steady, regular care and watchfulness which his other duties would allow a very careful and prudent person to give to it. *Ib.* 466.

See COMMON CARRIERS ; EJECTMENT, 4-7.

RECOUPMENT. See LANDLORD AND TENANT, 13 ; PLEADING AND PRACTICE, 9, 10.

REFORMATION. See CHANCERY, 38.

## RENTS.

1. *Rent an incident to, and passes with the reversion.*—Rent is an incident to the reversion and passes with it, in the absence of an express reservation in the transfer or assignment, whether the transfer or assignment is the voluntary act of the lessor, or results by operation of law, and whether it is an absolute conveyance or a mortgage. *Coffey v. Hunt*, 236.
2. *When bill in equity can not be maintained for rent.*—Where land was rented for a part of the crop, and the tenant, after the rent became due, delivered the part of the crop stipulated to be paid by him as rent to a third party, who received it with notice, but under claim,—*held*, that a bill in equity can not be maintained by an assignee of the landlord against the tenant and the party receiving the rent, for its recovery, he having a clear, adequate and complete remedy at law. *Ib.* 236.
3. *Motion for rents accruing after judgment in real action ; statute of limitations.*—A motion under the statute by the plaintiff in a real action for rents accruing after judgment, and before delivery of possession (Code, § 2958), is a substitute for an action for mesne profits, is in the nature of a suit for use and occupation, or for arrears of rent, and belongs to the class of actions which are barred by the statute of limitations of six years, (Code, § 3226). *Kirkland v. Trott*, 321.

See EJECTMENT, 3 ; LANDLORD AND TENANT, 6, 7, 12, 13, 17-21 ; MORTGAGE, 1 ; TENANTS IN COMMON, 3-5.

## RULE OF REPOSE.

1. When presumption of payment of purchase-money of land indulged from lapse of time, see *Kelly v. Hancock*, 229.

See CHANCERY, 2.

## SALES.

1. *Judicial sale ; when void.*—A sale of property under void process is a nullity, and confers no title on the purchaser. *Meyer v. Hearst*, 390.
2. When contract of sale executory, see *Fry v. Mobile Savings Bank*, 473.

See AMBIGUITY, 2.

## SELMA, CITY COURT OF.

1. *Authority to issue remedial writs.*—The City Court of Selma, being, by the express terms of the statute creating it, clothed with "the authority to issue writs of injunction, *mandamus*, *certiorari*, prohibition, *ne creat*, and all other remedial writs," has, under the well defined legislative policy of this State, intended to expedite the administration of justice, the authority to issue, or order the issue of such writs, returnable into any court of the State having jurisdiction of them. *East & West R. R. Co. v. East Tenn., Va. & Ga. R. R. Co.*, 275.

SET-OFF. See PLEADING AND PRACTICE, 12.

## SHERIFF.

1. *Action against sheriff for failure to make money on execution; measure of damages.*—In an action against a sheriff and the sureties on his official bond for failing to make the money on an execution, the actual injury sustained is, in the absence of statutory regulation, the measure of damages; and hence, it is competent for the defendants to show that the plaintiff has sustained no injury. *Abbott, Downing & Co. v. Gillespy, 180.*
2. *Same; what may be shown in defense.*—It is competent for the defendants, in defense of such an action, to show that the defendant in execution had no property subject to levy and sale under execution at law; or that his property was encumbered by mortgage or other lien, of the existence of which the plaintiff was chargeable with notice. *Ib. 180.*
3. *Same; when prior execution no defense.*—But it is no defense to such an action, that the sheriff had in his hands another and prior execution against the debtor, unless that execution had been actually levied. *Ib. 180.*
4. *Same; failure to levy on exempt property.*—While the statute does not make it the absolute and imperative duty of a sheriff to levy upon exempt property, where the debtor has failed to file his declaration and claim in the office of the probate judge, it is the safer policy for him to make the levy, thereby enabling the creditor to contest the claim of exemption under the provisions of the statute, as, on his failure or refusal to levy upon such property, when shown to have been in the debtor's possession, he assumes the burden of proving that it was in fact exempt. *Ib. 180.*
5. *Same; admissibility of evidence.*—A sheriff, in an action against him for failing to make the money on execution, may testify as a witness for himself, that he made diligent search for property belonging to the defendant in execution, and found none; but he can not testify that he returned several executions against such defendant "no property found," unless he first lays a proper predicate for the introduction of secondary evidence of the existence and contents of the executions. *Ib. 180.*
6. *Same; proof of insolvency.*—The insolvency of the defendant in execution in such case, can not be testified to as a collective fact, it being a legal conclusion deducible from facts and circumstances in evidence; but it may be shown by evidence of the issue of executions on other judgments against the defendant in execution, and of the returns thereon of "no property found." *Ib. 180.*
7. *Same; what no defense.*—It is no defense to an action against a sheriff for failing to make the money on execution, that he declined to levy on property in the possession of the execution debtor, because he honestly believed that it was exempt; and hence, evidence of that fact is inadmissible for him. *Ib. 180.*
8. *Same; when claim of exemption admissible for sheriff.*—In such action, a claim of exemption, properly verified and filed in office of probate judge after the issue of the execution, but before any levy is made, by the defendant in execution, covering all the property found in his possession, is competent evidence for the defendant; as such claim is made by statute *prima facie* evidence of its correctness as against the debtor's creditors. *Ib. 180.*
9. *Trespass against officer levying process; knowledge of plaintiff's claim as showing malice.*—Ordinarily, the fact that a sheriff or other ministerial officer, acting under legal process, seizes property with a knowledge that it is not subject to seizure, either because it is the property of a stranger, or because it is exempt by law, is a circumstance indicative of malice, or of that degree of recklessness which is the equivalent of malice; and, in an action of trespass against him, evidence of the fact is admissible, that the jury



SHERIFF—*Continued.*

- may determine whether they will award vindictive, in addition to actual damages. *Alley v. Daniel*, 403.
10. *Same; when knowledge of plaintiff's claim immaterial.*—But where the officer seizing the property is indemnified, it being his duty to proceed, although he may know that the property is not subject to the process, evidence of such knowledge on his part is irrelevant and inadmissible. In such case, if the officer acts in good faith, and there are no circumstances of aggravation, no facts indicative of a bad motive, nothing more than information that the property is not subject to the process, compensatory damages alone can be recovered. *Ib.* 403.
  11. *Same; evidence of knowledge.*—But in cases where the officer's information or knowledge is material, the practice of introducing *ex parte* affidavits made by the plaintiff and others, and exhibited to the officer prior to the sale, for the purpose of proving such information or knowledge, is questioned. *Ib.* 403.
  12. *Same; when charge in reference to vindictive damages objectionable.* In trespass *de bonis asportatis*, a charge in reference to vindictive damages, which gives to the jury a discretionary power to award them, without stint or limit, and which leaves the jury without any rule whatever by which to award them, is objectionable. *Ib.* 403.
  13. *Execution of process regular on its face, though void in fact; § 3041 of Code construed.*—The statute providing that a sheriff or other ministerial officer is justified in the execution of process regular on its face, whatever may be the defect in the proceeding on which it was issued (Code, 1876, § 3041), is intended only for the protection of the officer executing the process, and can not impart validity to a levy and sale made by him under the process; nor can the protection of the statute be extended to third parties who procured the issue and execution of the process. *Meyer v. Hearst*, 390.
  14. *Fees for collecting money under process; what service covered by.*—The commissions allowed a sheriff by statute for collecting money on a *fieri facias* include compensation for all the acts of levy and sale required to effect the collection, and are the same whether he receives the money from the defendant on demand, or whether he is put to the trouble of levying and selling, in order to "make the money;" and the rule of commissions in attachment suits is the same, with the exception that a small fee is allowed for making the levy; hence, no extra compensation can be allowed for clerk-hire, or making the return. *Kahn, Wolf & Sons v. Locke*, 332.
  15. *Allowance for removal of, and guard over goods levied on; when proper.*—When a stock of merchandise is levied on under an attachment or execution, and it becomes necessary to remove it, and to employ a guard or watchman, for its preservation, these services justify a special, reasonable allowance to the sheriff, to be paid out of the proceeds of the sale. *Ib.* 332.

## SLANDER.

1. *Action for slander; when complaint insufficient.*—In an action for slander, if the words used are susceptible of two meanings, the one harmful and the other innocent, if they be ambiguous, or unmeaning in the absence of other stated facts, or if it be charged that they were uttered in irony, the pleader must set forth enough antecedent or attendant facts to raise the implication that the offensive charge was intended; merely asserting that the utterer intended to charge a particular crime, is not sufficient, unless the unaided words have that import. *Long v. Musgrove*, 158.
2. *Same.*—Thus tested, it was held that a count in slander in the complaint in this case was insufficient on demurrer. *Ib.* 158.

SLANDER—*Continued.*

3. *Same; when charge free from error.*—In an action for slander, in charging plaintiff with the larceny of ballot boxes, a charge given at the defendant's request, instructing the jury that "larceny means the felonious and fraudulent taking of another's property, with the felonious intent to deprive the owner of the property, or to convert it to his own use; and if the jury believe that the words spoken by the defendant were not intended to convey, and did not convey to those who heard it the meaning that the plaintiff stole the ballot boxes for such a purpose, and with such felonious intent, then they must find for the defendant," is free from any error of which the plaintiff can complain. *Ib.* 158.

## SPECIFIC PERFORMANCE.

1. *When decreed against privies.*—The rule is, that when specific performance of a contract would be decreed between the original parties, it will be decreed between all persons claiming by privity under them, unless some intervening equity prevents; and a purchaser of land, with notice of a prior executory contract for the sale of the same land, stands in the shoes of his vendor, and holds his acquired title as trustee, and subject to the equities of the prior purchaser. *Meyer Bros. v. Mitchell*, 475.

See LIMITATIONS, STATUTE OF, 1.

## STATUTES.

1. *Repeal of statutes by implication not favored.*—The repeal of statutes by implication is not favored; and, ordinarily, the courts will not declare a prior statute to have been repealed by a subsequent one, in the absence of express words, unless the provisions of the two are directly regnant. *Roberts v. Pippen*, 104.
2. *When statute not repealed by implication.*—The act of March 1st, 1881 (Pamph. Acts, 1880-1, p. 31), amending section 2681 of the Code of 1876, which prescribes a penalty against probate judges for issuing marriage licenses to minors in certain cases, after providing that nothing contained in the act should "affect the liability of probate judges incurred for the issuance of licenses" prior to the passage of the act, repeals the section as it then stood. This act was itself amended by the act of February 5th, 1883 (Pamph. Acts, 1882-3, p. 38), the provisions of which are expressly made to apply to "all suits that hereafter may be brought, or which are now pending under section 2681 of the Code, as amended" thereby, or by the act of March 1st, 1881; and which repeals "all laws and parts of laws in conflict with the provisions of this act." *Held*, that the act of February 5th, 1883, did not repeal the saving clause of the act of March 1st, 1881, or affect a suit brought under section 2681, as it originally stood, and pending on 1st March, 1881. *Ib.* 103.
3. *Qui tam action against judge of probate for issuing marriage license; effect of amendatory acts on pending suit.*—Neither the act of March 1st, 1881, amending section 2681 of the Code of 1876 (Pamph. Acts, 1880-81, p. 31), nor the act of February 5th, 1883, amending the act of March 1st, 1881 (Pamph. Acts, 1882-3, p. 38), affected the rights of parties to an action brought against a judge of probate for issuing a marriage license to a minor contrary to the statute, under section 2681, as it originally stood, and pending at the time of the approval of both of the amendatory acts. *Fulghum v. Roberts*, 341.
4. *Statute authorizing relief of married women from disabilities of coverture strictly construed.*—The statute conferring on the chancellors

## STATUTES—Continued.

of this State power to relieve married women of the disabilities of coverture (Code, 1876, §§ 2731-32), is the delegation of power which is in its nature not strictly judicial, but is a part of the general prerogative power of the General Assembly, to define or change the legal status of citizens, upon whom the general law had imposed special disabilities; and like all other statutory powers, it must be exercised in the mode, and for the purposes the statute appoints and declares. *Falk v. Hecht*, 293.

5. *Damages against corporation for killing minor child; section 2899 of the Code construed.*—Section 2899 of the Code of 1876, providing that "when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation, or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess," creates a new cause of action, is highly penal in its terms, and must be construed as a penal statute. *Smith v. Louisville & Nashville R. R. Co.*, 449.
6. *Person non compos mentis; statute 17 Edward 2.*—The statute of 17 Edward 2, Ch. 10 and 19, conferring on the king, as *parens patriæ*, power to take care of the property of lunatics and idiots, though enacted before the settlement, or even the discovery, of this country, being inconsistent with our institutions and form of government, is not of force with us. *Whetstone v. Whetstone's Ex'rs*, 495.

See CONSTITUTIONAL LAW.

## SUMTER, COUNTY COURT OF.

1. *Trial by court without jury; when finding not reviewable by this court.* When a defendant charged with a misdemeanor is tried by the county court of Sumter county, without the intervention of a jury, under the provisions of the statute regulating the trial of misdemeanors in that county (Pamph. Acts, 1882-83, p. 214), the decision of the court upon the facts is equivalent, in legal effect, to the verdict of a jury, and, in the absence of statutory power, can not be reviewed by this court on appeal. *Calloway v. State*, 37.

## TELEGRAPH COMPANIES.

1. *Liability of, for failure to deliver message; measure of damages.*—The proposition is fully sustained by the authorities, that, where a telegraph company receives, and, for a valuable consideration, agrees to transmit and deliver a message, expressed in plain language, directing the sale of cotton owned by the sender, and, without lawful excuse, fails to transmit and deliver the message in due time, the sender can recover the actual damages sustained by the fall in the market-price of the cotton between the time it would have been sold, if the message had not been delayed, and the time it was actually sold; qualified, however, by the further proposition, that so soon as the sender discovers that his message has not been forwarded, it becomes his duty, within a reasonable time, to take the requisite steps to prevent further loss, which is usually done by repeating the order or direction to sell. *Daughtery v. Am. Union Tel. Co.*, 168.
2. *Same; measure of damages when message in cipher.*—The liability of the telegraph company not depending on the knowledge which the operator may have of the contents of the message, the same rule as to the measure of damages applies even where the mes-



TELEGRAPH COMPANIES—*Continued.*

sage is in cipher, and is not explained to the operator, who is ignorant of its purport and object. *Ib.* 168.

3. *Suit on contract by telegraph company for delivery of message.*—If an agent, in delivering and paying for the message to be forwarded discloses the name of his principal, for whom he is acting, the contract for the transmission and delivery of the message being oral, this makes it the principal's contract, upon which he can, and should sue in his own name. *Ib.* 168.

## TENANTS IN COMMON.

1. *Adverse possession.*—The seizin and possession of a tenant in common constitute the seizin and possession of his co-tenants; and an uninterrupted exclusive possession by him is not usually deemed adverse, unless accompanied by circumstances indicating an expulsion or ouster of his co-tenants. *Brady v. Huff*, 80.
2. *Same.*—A public repudiation by a tenant in common of his co-tenant's title, and a hostile claim of exclusive ownership in himself, operate at once to set in motion the statute of limitations against the co-tenant. *Ib.* 80.
3. *Same; liability of tenants in common for use and occupation.* Where one tenant in common forcibly evicts another, or the one in possession keeps the other out, or refuses to let him enter, this constitutes an *ouster* which will support ejectment; and in such action, the plaintiff may recover his share of the value of the use and occupation wrongfully withheld from him. *Kirkland v. Trott*, 321.
4. *Same; tenants in common; res adjudicata.*—On a motion under the statute by the plaintiff in ejectment for rents accruing after judgment, in a case where the parties are tenants in common, the recovery in ejectment is a conclusive adjudication against the defendant, that he had ousted the plaintiff. *Ib.* 321.
5. *Same; effect of appeal from recovery in ejectment, and of supersedeas, when parties are tenants in common.*—Where one tenant in common obtained a judgment of recovery in ejectment against his co-tenant, from which the latter appealed to this court, and executed a bond for the purpose of superseding the judgment, on a motion made by the plaintiff for rents accruing after judgment, on an affirmance in this court, the defendant can not be heard to say, that the bond did not operate as a *supersedeas*, and, for this reason, the plaintiff was not prevented from entering by the appeal. The bond, in such case, furnished a sufficient excuse to the plaintiff for not attempting to take possession pending the appeal. *Ib.* 321.
6. *Possession of personal property.*—The possession of personal property by a tenant in common, in full recognition of the rights of his co-tenant, is the possession of the co-tenant. *Wortham v. Gurley*, 356.

See CHANCERY, 25-28; PARTITION.

## TRESPASS.

1. *When charge in reference to vindictive damages objectionable.*—In trespass *de bonis asportatis*, a charge in reference to vindictive damages, which gives to the jury a discretionary power to award them, without stint or limit, and which leaves the jury without any rule whatever by which to award them, is objectionable. *Alley v. Daniel*, 403.

See CHANCERY, 48-54; SHERIFF, 9-11.

TRIAL OF RIGHT OF PROPERTY.

1. *Trial of right of property levied on under attachment; damages for delay not authorized.*—The statute authorizing the jury to award damages against the claimant in a trial of right of property, if it be shown that the claim was interposed for delay (Code, § 3343), by its terms applies only when there is a levy of *execution* upon the property; it is incapable of application, when the levy is of an *attachment*. *Murphy v. Butler, Pitkin & Co., 381.*

See HUSBAND AND WIFE, 18-20, 26-27.

TROVER.

1. *When possession will support.*—When personal property, in the possession of the widow, is levied on and sold under an execution issued on a void judgment against her deceased husband, she may maintain trover on her possession, unaided by title, for a conversion of the property. *Meyer v. Hearst, 390.*

TRUSTS AND TRUSTEES.

1. *Powers or trusts; duration of.*—The general rule is, that powers or trusts can not continue beyond the period required by the purposes for which they were created. *Fox v. Storrs, 265.*
2. *Same; will construed.*—A testator devised and bequeathed to his widow the legal title to all his estate, impressed with an express trust for the support, maintenance and education of his children, and coupled with the power to manage and control his property during her life or widowhood, or until there should be a distribution under the provisions of the will; and further provided for the allotment to each child, on marrying or attaining majority, of his or her share of the estate, the family relation continuing as to the others, and for an absolute division and distribution on the second marriage of the widow.—*Held*, that a general, discretionary power conferred on the widow by the will to sell all or any part of the testator's estate, not limited to any particular purpose or period of time, terminated on her second marriage, and was incapable of exercise by her thereafter. *Ib. 265.*
3. *Continuing trust; when time does not run against.*—When there is a continuing trust, with active duties required of, and performed by the trustee, the trust is analogous to a running, mutual account, and time does not run against it; but each act done under, or in recognition of the trust, is a renewal of the obligation it imposes. *Whelstone v. Whelstone's Ex'rs, 496.*

See CHANCERY, 1-7, 21.

USAGE.

1. *Usage as an element of contract; when admissible.*—A usage or custom, to be admissible in explanation of the terms of a contract which are ambiguous or doubtful in signification, must be reasonable, must not contravene or displace any of the general principles of statutory or common law, or vary or contradict the express terms of the contract, and must be brought home to the knowledge of the party sought to be charged, either by proof of actual notice, or by proof of its existence sufficiently long to raise a presumption of knowledge. *East Tenn., Va. & Ga. R. R. Co. v. Johnston, 596.*

USE AND OCCUPATION. See TENANTS IN COMMON, 3.

## USURY.

1. *Action for failure to enter satisfaction of mortgage; how right of recovery affected by usury.*—If the mortgage debt is usurious, and the mortgagor had fully paid the principal before making the request for entry of satisfaction, and of that fact there is no real ground of contestation, no reason for substantial doubt, the mortgagee can not withhold the entry of satisfaction, because the nominal amount of the debt, including the stipulated interest, had not also been paid. *Scott v. Field*, 419.
2. *When lender of money at usurious rate of interest not a bona fide purchaser.*—W. & Co., having sold to L. G. & Co. a bale of cotton, by mistake gave them a delivery order on a warehouseman for it before it was paid for. Afterwards L. G. & Co., without taking actual control of the cotton, and without presenting the delivery order to the warehouseman, paid for the cotton, and then received a second delivery order therefor from W. & Co., they not remembering that they had given the first, and under the second order the cotton was sold by L. G. & Co. and delivered by the warehouseman, who was in ignorance that an older order was outstanding. L. G. & Co. borrowed from C. \$600 on short loan, promising him interest at the rate of one dollar per day, and at the same time, as security for the loan, they delivered to him delivery orders for certain bales of cotton, including the first order given them by W. & Co. L. G. & Co. did not repay to C. the money borrowed, became insolvent, and the collaterals placed in pledge were insufficient to reimburse him, without resorting to the bale of cotton for which W. & Co. delivered the orders. *Held*, in an action on the case by C. against W. & Co. to recover the value of the bale of cotton, that the loan of money made by C. to L. G. & Co. being usurious, C. is not a *bona fide* purchaser for value in that sense which will enable him to triumph over the complete defense which W. & Co. could make, if the suit were by L. G. & Co. (*Saltmarsh v. Tuthill*, 13 Ala. 390, and *Carlisle v. Hill*, 16 Ala. 398, reaffirmed and followed.) *Wailes & Co. v. Couch*, 134.
3. *Same; nature of defense.*—The defense, in such case, is not usury, but the improper and unauthorized use which L. G. & Co. made of the delivery order, and usury is invoked merely to preclude C. from claiming the shield of a *bona fide* purchase; and hence, a special plea setting up the usury is not required. *Ib.* 134.

## VENDOR AND PURCHASER.

1. *Vendor's lien, when title retained; nature of.*—When a vendor of lands retains in himself the legal title, covenanting to convey it at a future day, upon condition that the vendee makes payment of the purchase-money, he carves out his own security, which is in the nature of a mortgage, and to which all the essential incidents of a mortgage attach. *Lowery v. Peterson*, 109.
2. *Same; distinction between, when title conveyed and when retained.* There is a plain and recognized distinction between the equitable lien which a vendor of lands has, when he conveys the legal title, and the security he carves out for himself, when he retains the legal title, covenanting to part with it only upon the payment of the purchase-money. In the latter case, independent of statute, a transfer by delivery of a note or bond given for the purchase-money passes, in equity, the security retained for the debt. *Ib.* 109.
3. *Lien on lands for purchase-money; when vendor can not dispute his own title.*—A vendor of lands, retaining in himself the legal title as security for the payment of the purchase-money, can not, as against an assignee of a note given for the purchase-money, seeking to en-



VENDOR AND PURCHASER—*Continued.*

force the security, be heard to dispute his own title, or to aver that he has not an estate in the premises co-extensive with that he has covenanted to convey. *Ib.* 109.

4. *Stipulation for forfeiture in contract for sale of land ; when waived.* A stipulation in a contract for the sale of land, providing for a forfeiture of the contract if the purchase-money is not paid as it becomes due, and binding the purchaser, in the event of forfeiture, to pay rent, is reserved for the benefit of the vendor, and may be waived by him; and it is waived by his accepting part payment of the first installment of the purchase-money before it is due, and by transferring a part of the installment in payment of a debt. *Ib.* 109.

5. As to burden of proof on plea of *bona fide* purchase, see *Barton v. Barton*, 400.

See USURY, 2, 3.

VERDICT. See PLEADING AND PRACTICE, 15.

## WILCOX, COUNTY COURT OF.

1. *Trial of misdemeanor without jury.*—The provision of the general law creating the county court and clothing it with jurisdiction of misdemeanors, that if a trial by jury is not demanded, "the judge shall determine both the law and facts, without the intervention of a jury," etc. (Code, § 4718), applies to the jurisdiction of the county court of Wilcox as enlarged by the special statute of February 23rd, 1881. (Pamph. Acts, 1880-1, p. 295.) *Bell v. State*, 25.

## WATERS.

1. *Rights of proprietors of superior and inferior heritages as to flow of surface water.*—While the owner of higher lands has a servitude or natural easement upon the lower adjoining land for the discharge of all surface water flowing naturally from the former on the latter, and the natural passage of such water can not be prevented or obstructed by the owner of the lower, to the injury of the higher land, this servitude or easement extends only to surface water arising from natural causes, as by rain, and does not authorize the proprietor of the higher land, by the collection of water into drains or artificial channels, to precipitate it in increased quantity and volume upon, and to the detriment of the lower land. *Crabtree v. Baker*, 91.
2. *Proprietor of inferior heritages; right to stop flow of surface water.* If the owner of the higher land, by drains or channels artificially constructed, collects the surface water thereon and discharges it, in undue and unnatural quantities, upon the lower lands, this would be an open invasion of the rights of the owner of the latter, which, if suffered to continue without a resort to legal remedies for the period prescribed by the statute of limitations for the recovery of lands, would become evidence of an adverse right; and against this invasion he can protect himself by placing obstructions in the drain or channel, if thereby he does not inflict injury upon innocent strangers; the rule being that, where a party can maintain an action for a nuisance, he may enter and abate it. *Ib.* 91.
3. *Same; may defend against injunction to remove obstructions, without proof of actual damage.*—In such case, the owner of the lower lands may defend against a bill in equity filed by the owner of the higher lands, to enjoin the continuance of the obstructions, without proof of actual damage suffered by him from the water discharged through the artificial drains or channels. *Ib.* 91.
4. *Injury resulting from wrongful act; when wrongdoer can not complain.*—In such case, the complainant can not be heard to com-

WATERS—*Continued.*

plain because the obstructions have increased the quantity of water which would flow or stand upon adjacent roads used by the public, although causing peculiar injury to him, he being the original wrongdoer, and the injury having resulted from his own wrongful act in flooding the defendant's lands. *Ib.* 91.

## WILLS.

1. *Construction of will ; what an executorial power, and not a mere personal trust.*—A testator, after providing for the payment of debts, directed that his estate, real and personal, should remain in the hands of his wife, "to rear and educate his three children, and to remain hers during her life-time or widowhood," and that, in case of her marriage, his estate, real and personal, should be sold, and the proceeds equally divided between her and his three children. *Held*, that the power of sale expressed in the will is not a mere personal trust, to be executed only by the executor, but is a general power, unattended by any discretionary power, or evidence of personal confidence, which may be exercised, under the statute, by an administrator *de bonis non*. *Watson v. Martin, Adm'r*, 506.
2. *Same ; conversion of realty into personalty.*—It was further held, the widow having married, that under the will, as affected by the widow's marriage, the children did not take the land as land, but that it was converted into personalty, requiring the services of a personal representative for its administration. *Ib.* 506.

See TRUSTS and TRUSTEES.

## WITNESS.

1. *Contract attested by subscribing witnesses ; proof of execution.*—In a suit in equity for the specific performance of an executory contract for the sale of land, against the vendor and another claiming under him by subsequent conveyance, the execution of the contract, if denied by the latter, must be proved, although the denial is not under oath ; and if the contract is attested by subscribing witnesses, its execution must be proved by one or more of such witnesses, unless sufficient excuse is shown for not producing them. *Meyer Bros. v. Mitchell*, 475.
2. *Falsus in uno, falsus in omnibus ; when maxim has no application.* The maxim, *Falsus in uno, falsus in omnibus*, has no application to cases in which a false statement is inadvertently, and not willfully made by a witness. *Roberts v. Pippen*, 103.
3. *Re-examination of witness discretionary with primary court.*—Recalling and re-examining a witness in the course of a trial at law, either in a civil or criminal case, is a matter resting in the sound discretion of the primary court, and is not revisable by this court on appeal. *Hobbs v. State*, 1.
4. *Infant of tender years ; competency as a witness.*—The sole reason that infants of tender years are not allowed to testify as witnesses is, that they do not, at the time their testimony is offered, comprehend and realize the danger and impiety of falsehood ; and hence, that an infant was of too tender years to be sworn, at the time of the occurrence of the transaction, about which he is afterwards called to testify, does not render him incompetent, but is merely a circumstance that bears on the weight of his testimony. *Kelly v. State*, 21.
5. *Same.*—That an infant female was incompetent to testify on a former trial of a defendant charged with an attempt to have carnal knowledge of her, and was then so adjudged by the court, does not

WITNESS—*Continued.*

- affect her competency on a subsequent trial of the same case, had after new trial granted. *Ib.* 21.
6. *Testimony of a deceased witness on former trial; when may be proved.* The testimony of a deceased witness on a former trial, when he was subjected to cross-examination, is admissible on a subsequent trial, and may be proved by any competent witness. *Jeffries v. Castleman*, 262.











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